Supreme Court, U. S.
FILED
DEC 10 1977
MICHAEL RODAK, JR., CLERK

No. 77-836

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

SMITH JOHN AND HARRY SMITH JOHN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WADE H. McCREE, Jr.,
Solicitor General,
JAMES W. MOORMAN,
Assistant Attorney General,
CARL STRASS,
LARRY G. GUTTERRIDGE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1A–33A) is reported at 560 F. 2d 1202. The district court did not write a formal opinion. Its order denying a Motion in Arrest of Judgment, from which the appeal was taken, is reflected in the agreed Statement of Facts (App. C, *infra,* p. 37A) entered pursuant to Rule 10(d), Fed. R. App. P. The issues upon which this case was decided and upon which this petition rests were raised *sua sponte* by the court of ap-

peals and briefed therein at that court's request (App. D, *infra,* p. 39A).

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* p. 34A) was entered on October 11, 1977. On October 29, 1977, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including December 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal courts have jurisdiction over criminal offenses committed on land purchased and held in trust by the United States for the Mississippi Band of Choctaw Indians.

2. Whether the Indian Reorganization Act (the Wheeler-Howard Act), 25 U.S.C. 461 *et seq.,* authorizes the Secretary of the Interior to establish a reservation for Indians who were not recognized as a tribe prior to enactment of that statute.

3. Whether a group of Indians, remnants of one of the five Civilized Tribes, who live on lands held in trust for them by the United States, constitute a "dependent Indian communit[y]," within the meaning of 18 U.S.C. 1151(b).

STATUTES INVOLVED

Sections 1151 and 1153 of Title 18, United States Code, 62 Stat. 757, 758, 63 Stat. 94; Sections 5, 7, 16, and 19 of the Indian Reorganization Act (the Wheeler-Howard Act), 48 Stat. 984–988, 25 U.S.C.

465, 467, 476, 479; Section 9 of the Act of May 25, 1918, 40 Stat. 573; and the Act of June 21, 1939, 53 Stat. 851, are set forth in Appendix E, *infra,* pp. 40A–45A.

STATEMENT

1. Respondents Smith John and Harry Smith John, who are Indians, were indicted in the United States District Court for the Southern District of Mississippi for assaulting one Artis Jenkins with intent to kill, in violation of 18 U.S.C. 1153 and 113(a).[1] The indictment stated that the incident took place "on and within the Choctaw Indian Reservation and on land within the Indian country under the jurisdiction of the United States of America."

At trial the government requested instructions on assault with intent to kill and also on assault with a dangerous weapon with intent to do bodily harm and without just cause or excuse. Respondents requested an additional instruction on the lesser-included offense of simple assault. The court gave the requested instructions and the jury convicted respondents on the charge of simple assault but acquitted them of the other offenses. Respondents were each sentenced to 90 days' imprisonment and a $300 fine.[2]

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[1] The appeal was taken on an agreed statement of facts. The statement (App. C, *infra*) does not disclose whether the victim was an Indian or a non-Indian.

[2] Subsequent to the federal prosecution and conviction, respondents were tried and convicted in the Circuit Court of Leake County, Mississippi, of aggravated assault, in violation of Miss. Code Ann. 97–3–7 (2) (Supp. 1976), for the same incident. The Supreme

Respondents then filed a timely Motion in Arrest of Judgment, under Rule 34, Fed. R. Crim. P., asserting that the district court lacked jurisdiction over lesser-included offenses to those enumerated in 18 U.S.C. 1153.[3] The district court denied the motion and respondents appealed. On appeal, the court of appeals *sua sponte* directed (App. D, *infra,* p. 39A) [4] the Department of Justice to brief the issue whether the district court had jurisdiction to try the case pursuant to 18 U.S.C. 1153. The court asked in particular whether the alleged offenses occurred within the "Indian country," as Section 1153 requires.[5] Both the United States

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Court of Mississippi affirmed their conviction on grounds substantially similar to those set forth in the court of appeals' opinion. *John* v. *Mississippi*, 347 So. 2d 959 (Miss. Sup. Ct.). The defendants' Jurisdictional Statement seeking review of that decision is currently pending before this Court. *John* v. *Mississippi*, No. 77–575, appeal docketed, October 18, 1977.

[3] The Major Crimes Act, 18 U.S.C. 1153, does not expressly provide for jurisdiction over lesser-included offenses. However, this Court has held that Indians prosecuted under Section 1153 are entitled to a lesser-included offense instruction. *Keeble* v. *United States*, 412 U.S 205. Were the victim a non-Indian, jurisdiction over simple assault would be conferred directly pursuant to 18 U.S.C. 1152 and 113(e).

The question whether the offense occurred within the Indian country, the issue upon which the court of appeals decided the case, is the same under both 18 U.S.C. 1152 and 1153.

[4] The court of appeals' letter carries the same date as the denial by that court of the United States' petition for rehearing in *United States* v. *State Tax Commission of the State of Mississippi*, 505 F. 2d 633, rehearing denied, 535 F. 2d 300, rehearing *en banc* denied, 541 F. 2d 469 (C.A. 5).

[5] "Indian country," for purposes of 18 U.S.C. 1153, is defined by 18 U.S.C. 1151 (App. E, *infra*, p. 40A).

and the defendants filed briefs in response, arguing that the district court had jurisdiction.

The court of appeals disagreed. Although noting (App. A, *infra,* pp. 15A–20A) that Congress had purchased lands in trust for the Mississippi Choctaws and that the Department of the Interior, acting pursuant to the Indian Reorganization Act, had proclaimed those trust lands "an Indian reservation" for the benefit of the Mississippi Band of Choctaw Indians, the court held those actions insufficient to reestablish federal jurisdiction over lands ceded by the Treaty of Dancing Rabbit Creek, 7 Stat. 333. Reviewing the pertinent congressional actions, the court concluded (App. A, *infra,* p. 19A) that "the specific provisions of the Treaty of Dancing Rabbit Creek with reference to the Mississippi Choctaws were not amended, modified or abrogated by the within described Acts of Congress, 1918–1939 [and] * * * that while the citizens of the State of Mississippi of Choctaw Indian blood are, anthropologically, Indians they are nevertheless subject to the inherent police powers of the State anywhere within its exterior boundaries." [6] With regard to the proclamation by the Department of the Interior, the court stated (App. A, *infra,* p. 20A) that "[q]uite obviously, Congress in 1934 was legislating for Indians in the government-guardian-ward relationship, and not for long emancipated individuals

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[6] Because it concluded that Congress had not intended to reestablish federal jurisdiction over the Mississippi Choctaws, the court did not reach the issue whether Congress constitutionally could do so (App. A, *infra*, pp. 13A–14A).

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outside that relationship" and that Congress thus had "provided no authority for the Proclamation of the Assistant Secretary in 1944."[7]

REASONS FOR GRANTING THE WRIT

This Court has long recognized the unique responsibility of the United States towards the Indian peoples within its borders. See *Cherokee Nation* v. *Georgia,* 5 Pet. 1; *Worcester* v. *Georgia,* 6 Pet. 515; *United States* v. *Kagama,* 118 U.S. 375. Pursuant to that responsibility, Congress has purchased and maintained lands in trust for the Mississippi Band of Choctaw Indians, a remnant of one of the Five Civilized Tribes, and has extended substantial federal assistance for their support. Moreover, the Department of the Interior, acting in accordance with the Indian Reorganization Act of 1934, has expressly proclaimed those lands an Indian reservation. Yet, despite this strong evidence of federal concern and involvement, and despite the reestablished tribal identity of the Mississippi Choctaws, the court of appeals in this case has deprived the federal courts of jurisdiction over these trust lands and, in its rationale, disabled the Secretary of the Interior from establishing or recognizing new Indian settlements subject to federal jurisdiction. Unless corrected, that decision will effectively terminate important federal efforts to promote self-government for the Mississsippi Choctaws and for other similarly situated tribes.

[7] The court did not discuss whether the congressional and administrative actions established a "dependent Indian communit[y]," within the meaning of 18 U.S.C. 1151(b).

Review by this Court is thus warranted because of the consequences of the decision for the Mississippi Choctaws and for the development of federal Indian policy.

Moreover, the reasoning of the court of appeals is at odds both with the intent of Congress and with prior decisions of this Court and of other federal courts of appeals. The identical question is also pending before the Court in *John* v. *Mississippi,* No. 77–575, appeal docketed, October 18, 1977, in which the Mississippi Supreme Court upheld the exercise of state jurisdiction over the identical crimes. Should this Court grant plenary review in both cases, and consolidate them for the purpose of argument and briefing, the State, the federal government, and members of the Mississippi Choctaw Band would have an appropriate opportunity to express their views on this vital question and assure this Court of a complete adversarial presentation.

1. The decisions of the Fifth Circuit in the present case and in *United States* v. *State Tax Commission of the State of Mississippi,* 505 F. 2d 633, rehearing denied, 535 F. 2d 300, rehearing *en banc* denied, 541 F. 2d 469 (C.A. 5)[8] have proved calamitous for the self-government of the Mississippi Band of Choctaw Indians and may carry similar consequences for other similarly recognized tribes and reservations. State authorities began exercising criminal jurisdiction over

[8] The United States did not seek certiorari in the Mississippi tax case because the court of appeals' determination that the Mississippi Choctaws were not a tribe was not essential to the decision of that case and could not properly be presented for further review. See App. A, *infra,* p. 3A.

Choctaws on the reservation after the initial decision in the Tax Commission case and have intensified their control since the decision in this case. Although the United States and the tribe are reluctant to abdicate responsibility for law enforcement activities on the reservation, the decisions of the court of appeals seem to leave them little choice. Indeed, under the rationale of the Fifth Circuit, the Mississippi Choctaws appear forever to have lost their unique character as Indians and wards of the United States, at least to the extent that the State of Mississippi elects to exercise dominion over them.

As a consequence, the Mississippi Choctaws may not only be "subject to the inherent police powers of the State anywhere within its exterior boundaries," as the court of appeals determined (App. A, *infra,* p. 19A), but subject to all other State powers as well. The Fifth Circuit has already indicated, albeit in apparent *dicta,* that the State may impose taxes upon the Tribe as upon its other citizens. *United States* v. *State Tax Commission of the State of Mississippi, supra.* If the Mississippi Choctaws are no more than "citizens of the State of Mississippi of Choctaw Indian blood [who] are, anthropologically, Indians," the State may also presume to subject the Choctaws to its civil laws, including, for example, zoning laws and child custody laws, to the exclusion of the federal and tribal courts. Under such conditions, the tribal identity, and perhaps the economic survival, of the Mississippi Choctaws would be imperiled.[9]

[9] Although the Fifth Circuit suggests (App. A, *infra*, pp. 20A–22A) that its holdings need not affect the relationship of the Mississippi Choctaws with the federal government, at least with regard to federal assistance programs, that assumption is open to question. For example, certain federal programs incorporate tribal and reservation status as prerequisites to qualification for assistance, and their application to the Mississippi Choctaws could be problematical. Moreover, the Fifth Circuit has implied that these Indians no longer maintain a ward-guardian relationship with the federal government, which may limit the constitutional power of the federal government to single them out for special care.

The threat is not to the Mississippi Choctaws alone. The decision at least casts immediate doubt on the status of other remnant groups of the Five Civilized Tribes within the Fifth Circuit (for example, the Seminole Tribe of Florida previously recognized in *Maryland Cas. Co*: v. *Citizens Nat. Bank of West Hollywood,* 361 F. 2d 517 (C.A. 5)), and could lead to assertion of state jurisdiction over tribes in other circuits. That possibility could prove especially serious in a state like California, where Indian title was extinguished shortly after its admission into the Union. *Barker* v. *Harvey,* 181 U.S. 481. Many California Indian reservations were thereafter created by purchase pursuant to appropriations for landless or homeless Indians, and many statutes appropriated funds for use in both Mississippi and California in similar or identical terms.[10]

Accordingly, prompt resolution of the issues in this case is needed before further jurisdictional conflicts arise and the United States' relationship with, and

[10] 40 Stat. 570, 573; 41 Stat. 12, 15; 41 Stat. 417, 420; 41 Stat. 1234, 1236; 42 Stat. 567, 570; 42 Stat. 1188, 1191; 43 Stat. 1149; 44 Stat. 461; 44 Stat. 941; 45 Stat. 206; 45 Stat. 1568–1569; 46 Stat. 286; 46 Stat. 1121.

responsibility for, tribes like the Mississippi Choctaws is drawn into greater uncertainty.

2. On the merits, we submit that the court of appeals erroneously deprived the federal courts of jurisdiction in this case. In doing so, the court misread the intent of Congress, both in passing legislation for the benefit of the Mississippi Choctaws and in enacting the Indian Reorganization Act of 1934, and it disregarded settled principles of statutory construction in matters affecting Indian interests. A brief history of the Mississippi Choctaws and their reservation is necessary to this discussion.

The territory involved in this dispute, while not retained by the Mississippi Choctaws over several centuries, was acquired by the United States for their benefit in a well-organized and frequently used manner. Cohen, *Handbook of Federal Indian Law* 103, 104, 296–298, 302, 303 (1942). In the early Nineteenth Century, the original Choctaw Tribe had negotiated several treaties with the United States, by which they ceded their lands in Mississippi to the federal government and were provided with new lands in Oklahoma. Treaty of Exchange of Territory, 7 Stat. 210; Treaty of Dancing Rabbit Creek, 7 Stat. 333. Certain members of the Tribe chose to remain in Mississippi, however, rather than leave their ancestral territory. These remaining Indians fell into destitute condition, and Congress, while presumably free to treat them like any other citizens of Mississippi, instead enacted the relief legislation at issue in this case.

Beginning in 1918, therefore, Congress authorized the purchase of lands for the Mississippi Choctaw Indians. Act of May 25, 1918, 40 Stat. 561, 573, and subsequent similar Acts.[11] Not surprisingly, the lands were not contiguous but were distributed within Leake, Neshoba, Newton, Attala, Scott, and Jones Counties, Mississippi (App. A, *infra,* pp. 5A–6A). On December 4, 1944, the Secretary of the Interior, under authority of the Act of June 21, 1939, 53 Stat. 851, and Section 7 of the Indian Reorganization Act of 1934, 25 U.S.C. 467, proclaimed this land[12] to be held in trust and to be a reservation for those Choctaw Indians of one-half or more Indian blood resident and enrolled in Mississippi (App. A, *infra,* p. 6A). The Mississippi Band subsequently adopted a constitution and by-laws pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. 476, which were approved by the Department of the Interior on May 22, 1945.

[11] The Act of May 25, 1918, 40 Stat. 573, appropriated money to enable the United States to purchase lands and provide other benefits for the Choctaw Indians of Mississippi. Since the Indians who remained were generally unable to repay the government, the Act of June 21, 1939, 53 Stat. 851, provided that title to land purchased under the Act of May 25, 1918, and subsequent similar Acts, would be held by the United States in trust for the Choctaw Indians, of one-half or more Indian blood, resident in Mississippi. Subsequently, pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, the United States acquired additional land in Mississippi in trust for the use and benefit of the Choctaw Indians of one-half or more Indian blood, resident in that State, bringing the total to approximately 19,000 acres.

[12] Some of the land currently included in the reservation has been added subsequent to this proclamation.

Since 1918 the Mississippi Band has also received various federal benefits. As the court of appeals recognized (App. A, *infra*, p. 21A), Congress annually appropriates funds which are administered by the United States for the Mississippi Band as if a reservation exists and the Indian Reorganization Act applies. These statutes contain no indication that Congress intended the Mississippi Choctaws to enjoy a different, less favorable, relationship with the United States than other Indian tribes, or that the federal interest in their welfare was irrevocably diminished by the Treaty of Exchange of Territory or the Treaty of Dancing Rabbit Creek.

In our view, these successive legislative and administrative actions are entirely sufficient to establish a reservation for the Mississippi Choctaws, qualifying as Indian country over which the federal courts have jurisdiction under 18 U.S.C. 1151(a).[13] Congress has ample authority to establish federal criminal jurisdiction over Indian trust lands under Article I, Section 8, Clause 3, of the Constitution, which gives Congress power over commerce with the Indian tribes.[14] See

[13] Unlike many traditional reservations, which include substantial land owned by non-Indians, the Mississippi Choctaw reservation consists solely of land held in trust by the United States for the Indians themselves. The United States is not seeking to assert jurisdiction over other lands interspersed among the trust holdings.

[14] Because it concluded that Congress did not intend to confer federal jurisdiction over the Mississippi Choctaws, the court of appeals did not reach the question of its power to do so with respect to once emancipated Indians. See note 6 *supra*.

United States v. *Kagama*, 118 U.S. 375, 378. Although most commonly exercised for the benefit of established tribes, the plenary power of Congress to regulate Indian affairs extends to individual Indians (*Board of Commissioners* v. *Seber*, 318 U.S. 705, 715; see also, *United States* v. *Rickert*, 188 U.S. 432, 444), and includes the power to provide federal jurisdiction and guardianship for the remnants of an established tribe (*United States* v. *McGowan*, 302 U.S. 535).[15] Congress may exercise that power regardless of prior treaties with the Indians (*Lone Wolf* v. *Hitchcock*, 187 U.S. 553), and we believe that by purchasing lands for the Mississippi Choctaws, requiring that they be held in trust for the Indians' benefit, and appropriating funds for the tribe's development and support, it plainly did so here.

Any possible doubt about the sufficiency of these actions to show congressional intent to establish a reservation was laid to rest by the 1944 proclamation of the Department of the Interior that the trust lands held for the Choctaw Tribe constituted an Indian reservation. The proclamation was issued pursuant to Section 7 of the Indian Reorganization Act of

[15] Congress also has constitutional authority, independent of its specific authority over Indians, sufficient to support its conferrence of criminal jurisdiction for acts committed on federal property, pursuant to the Property Clause, Article IV, Section 3, Clause 2, of the Constitution. This Court has recently reaffirmed the broad scope of Congress' powers pursuant to this clause, including the power to determine what are necessary rules respecting the public lands, and analogized this power to the police power of the States. *Kleppe* v. *New Mexico*, 426 U.S. 529, 539–541.

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1934, which authorizes the Secretary of the Interior "to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations." [16] Although the court of appeals held (App. A, *infra*, p. 20A) that the Indian Reorganization Act applies only to "Indians in the government-guardian-ward relationship, and not [to] long emancipated individuals outside that relationship," no such limitation may be derived from either the language or the legislative history of the Act, which is to be liberally construed for the Indians' benefit.[17] *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n. 7; *Bryan* v. *Itasca County*, 426 U.S. 373, 392. See, also, *Antoine* v. *Washington*, 420 U.S. 194, 199–200. Indeed, that reading of the Act directly conflicts with a contemporaneous interpretation of the Indian Reorganization Act by then Assistant Interior Solicitor, Felix Cohen, which contemplated the establishment of reservations for many Eastern groups of Indians such as the Mississippi Choctaws. Memorandum Opinion of the Assistant Solicitor, U.S. Department of the Interior, April 8, 1935 (App. F, *infra*).

[16] Indian country under 18 U.S.C. 1151(a) is not limited to those reservations constituted from lands to which the Indians retain their original title or right of possession. *Donnelly* v. *United States*, 228 U.S. 243, 268; *United States* v. *Pelican*, 232 U.S. 442, 449; see, also, Reviser's notes to the current codification, 18 U.S.C. 1151.

[17] As the court of appeals noted (App. A, *infra*, pp. 19A–20A), Congress naturally emphasized increased self-government for existing tribes, but there is no basis for concluding from this that additional tribes or reservations could not be recognized.

In concluding that the federal courts nevertheless lacked jurisdiction in this case, the court of appeals in our view gave unwarranted weight to the early treaties with the Choctaw Indians and to the fact that the remaining Choctaws became citizens of the state and once were subject to its jurisdiction. As we have noted, Congress may modify a treaty or take actions inconsistent with treaty provisions, where it deems it advisable to do so, and it is not a proper judicial function to hold Congress to enforcement of a hard bargain (especially where, as here, no party to the treaty objects to its modification), or to limit unreasonably Congress' authority to legislate for the Indians' benefit. *United States* v. *Sandoval*, 231 U.S. 28, 45–49; *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 310–316; *United States* v. *Holliday*, 3 Wall. 407, 419. Indeed, in *United States* v. *Sandoval*, *supra*, 231 U.S. at 46, this Court affirmed Congress' continuing power of guardianship over all "distinctly Indian communities." The Mississippi Choctaws, a group of some 2,000 Indians, the remnants of one tribe, who live in general proximity to one another in adjoining counties in a state, plainly constitute such a community. See *Winton* v. *Amos*, 255 U.S. 373.

It is well established that the state citizenship of tribal members is not incompatible with federal guardianship. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164; *United States* v. *Sandoval*, *supra*, 231 U.S. at 47, 48; *Winton* v. *Amos*, *supra*, 255 U.S. at 392. The extension of state jurisdiction is likewise irrele-

vant. If Congress has the authority to exercise its guardianship over the Mississippi Choctaws, its further action in providing a reservation and establishing federal criminal jurisdiction, in our view, preempts state jurisdiction over Indians pursuant to the Supremacy Clause. The State, of course, may continue to exercise jurisdiction over crimes involving only non-Indians (see *United States* v. *McBratney,* 104 U.S. 621), and may assume additional jurisdiction over Indians, with their consent. Section 403(b) of the Civil Rights Act of 1968, 82 Stat. 79, 25 U.S.C. 1323(b). And, even if a broader view is taken of the State's continuing jurisdiction,[18] there is neither authority nor reason to support the proposition that Congress is without power to reestablish a guardian-ward relationship with emancipated Indians, and make their affairs subject to federal jurisdiction, merely because those Indians once fell within the comprehensive jurisdiction of an individual state.[19]

[18] The Fourth Circuit has found concurrent criminal jurisdiction over a similar reservation. See 17–18 *infra* and n. 20.

[19] Since the power exercised is based on the Indian commerce clause and not on derivative legislative jurisdiction, the provisions of Article I, Section 8, Clause 17, of the Constitution, and the holding in *Paul* v. *United States*, 371 U.S. 245, requiring formal state consent to establishing an area of exclusive federal legislative jurisdiction, are inapplicable. See *Kleppe* v. *New Mexico*, 426 U.S. 529, 541–546. Indeed, the statute involved here, 18 U.S.C. 1153, inherently recognizes this distinction. It provides that Indians who commit particular offenses in a particular place shall be treated as if the crime were committed in an area under the exclusive jurisdiction of the United States.

Finally, we note that the court of appeals rejected without mention our alternative contention that the Mississippi Choctaws on their trust lands comprise a "dependent Indian communit[y] within the borders of the United States," over which the federal courts have jurisdiction pursuant to 18 U.S.C. 1151(b). In *United States* v. *McGowan,* 302 U.S. 535, this Court held that the Reno Indian Colony, "composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States and purchased out of funds appropriated by Congress in 1917 and in 1926" (*id.* at 537; footnotes omitted), was "Indian country" within the meaning of the federal liquor laws. The Court noted: "Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a 'reservation' or 'colony.' In the case of *United States* v. *Pelican,* 232 U.S. 442, 449, this Court said: 'In the present case the original reservation was Indian country simply because *it had been validly set apart for the use of the Indians as such, under the superintendence of the Government'*" (*id.* at 538–539 ~~593~~) (emphasis added by Court; footnote omitted). We believe that the same principles apply here.

3. The decision of the court of appeals also is incompatible with principles recognized by the Courts of Appeals for the Fourth, Tenth, and District of Columbia Circuits.

The Fourth Circuit has determined that lands purchased by the United States and held in trust for the

Eastern Band of Cherokee Indians, a remnant of the original Cherokee Tribe, are Indian country over which federal courts have criminal jurisdiction pursuant to 18 U.S.C. 1153. *United States* v. *Hornbuckle,* 422 F. 2d 391. Although the Fourth Circuit had earlier acknowledged that "the Eastern Band of Cherokee Indians had surrendered the right to their tribal lands, had separated themselves from their tribe, and had become subject to the laws of the State of North Carolina," *United States* v. *Wright,* 53 F. 2d 300, 306, the court in *Hornbuckle* nevertheless concluded that "the Eastern Band of the Cherokees has been recognized as an Indian tribe, and the land they occupy is subject to federal statutes pertaining to Indian reservations." *United States* v. *Hornbuckle, supra,* 422 F. 2d at 391. The history of the Mississippi Choctaws resembles that of the Eastern Band of Cherokees in numerous important respects, and there is no principled reason why the federal courts should have jurisdiction over one remnant of an Indian tribe in the Fourth Circuit yet be denied it over a similar remnant in the Fifth Circuit.[20]

Although the court of appeals in this case also concluded that Congress could not have intended federal

[20] The court in *Hornbuckle* stated in *dictum* that federal jurisdiction over the Eastern Band of the Cherokees was concurrent with State jurisdiction. *United States* v. *Hornbuckle, supra,* 422 F. 2d at 391; see, also, *State* v. *McAlhaney,* 220 N.C. 387, 17 S.E. 2d 352. The question of State jurisdiction over the Mississippi Choctaws is presented by the jurisdictional statement in *John* v. *Mississippi, supra,* which we believe should be considered in conjunction with the present case. See p. 7, *supra.*

jurisdiction to apply to Indian trust lands interspersed with non-Indian land in "checkerboard" fashion (App. A, *infra,* pp. 7A–8A),[21] similar reasoning has been rejected by the Tenth Circuit in *United States* v. *Martinez,* 442 F. 2d 1022, 1023–1024. In *Martinez,* federal authorities, alleging jurisdiction under 18 U.S.C. 1153, prosecuted a Navajo Indian for an incident occurring on "the so-called checkerboard area of western New Mexico" (*id.* at 1023). Describing this area as "a patchwork of land, some of which is owned by the Navajo Tribe, some of which is not, [and which] does not lie within the boundaries of any Indian Reservation" (*ibid.*), the court nevertheless upheld federal jurisdiction over the tribal lands (which had been "purchased with tribal funds from a corporate owner" (*ibid.*)) on the ground that they were "dependent Indian communities" (18 U.S.C. 1151(b)). Following the analysis adopted by this Court in *United States* v. *Sandoval, supra,* which requires examination of "the manner in which the pueblos had been treated by legislative and executive agencies" (442 F. 2d at 1023), the court concluded that federal actions with regard to such Navajos were sufficient to confer federal jurisdiction over the Navajo portion of the landholding checkerboard. We believe that similar considerations are relevant here. See pp. 10–17, *supra.*

Finally, the determination that Congress did not intend the Indian Reorganization Act ever to

[21] As we have stated earlier (see note 13, *supra*), the United States is not asserting jurisdiction over the non-Indian land.

bring "emancipated" individuals back within the guardian/ward relationship [22] is contrary to the decision of the District of Columbia Circuit in *Maynor* v. *Morton,* 510 F. 2d 1254. In *Maynor,* the court of appeals specifically recognized (510 F. 2d at 1256) that the Indian Reorganization Act, "[a]lthough * * * primarily designed for tribal Indians," applied to certain individual Indians as well:

> [I]t is clear from the language of the statute that some benefits of the Act were also open to any nonreservation Indian who could prove that he possessed at least one-half Indian blood. Among these benefits was the right to petition the Secretary to establish a reservation for such individuals, which, if granted, would afford them access to a wide range of federal Indian services (as members of a recognized Indian group on a reservation). [Footnote omitted.]

The court further noted (*id.* at 1256 n. 7) that the eligibility of non-Tribal Indians for such benefits had been explicitly recognized by the Department of the Interior shortly after the Indian Reorganization Act was passed (see Memorandum of April 8, 1935; App. F, *infra*).

In the present case, the Secretary of the Interior, in accordance with the Indian Reorganization Act and the Act of June 21, 1939, has proclaimed a reservation for the Mississippi Band of Choctaw Indians.

[22] For purposes of this discussion, we will assume that the Mississippi Choctaws at one time were not subject to that relationship.

The Fifth Circuit has recognized (App. A, *infra,* p. 19A) that the Mississippi Choctaws are anthropologically Indians and, indeed, it appears unquestioned that the technical requirements of the Indian Reorganization Act otherwise have been met. The court's conclusion, that no reservation exists, thus rests upon the erroneous premise that no reservation could be created for non-Tribal Indians, a proposition that the District of Columbia Circuit quite correctly has rejected.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
JAMES W. MOORMAN,
Assistant Attorney General.
CARL STRASS,
LARRY G. GUTTERRIDGE,
Attorneys.

DECEMBER 1977.

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APPENDIX A

No. 76-1518

United States of America, Plaintiff-Appellee,
v.
Smith John and Harry Smith John, Defendants-Appellants

October 11, 1977

Appeal from the United States District Court for the Southern District of Mississippi

Before COLEMAN, GODBOLD and HILL, Circuit Judges

COLEMAN, *Circuit Judge:* Smith John and his son, Harry Smith John, are Mississippi residents, of Choctaw Indian blood. In the District Court for the Southern District of Mississippi they were indicted for the commission of a felonious assault, with intent to kill, upon one Artis Jenkins, a violation of 18 U.S.C. §§ 1153 and 113(a). The indictment charged that the defendants were Indians, that the offense was committed in the Northest Quarter of Section 35, Township 11 North, Range 7 East, Leake County, Mississippi, on the Choctaw Indian Reservation, *on land within the Indian country* and under the jurisdiction of the United States.

At trial, the defendants requested an instruction on simple assault, to which there was no objection. They were convicted of that offense and were sentenced accordingly. This appeal followed.

Before the appeal could be heard these appellants served their 90 day jail sentences and discharged their fines. This suggests that there no longer exists any live case or controversy between these appellants and the United States, that this case is moot and should not be decided here. Were it not for the decision of the Supreme Court in *Sibron* v. *New York,* 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968), we would be inclined to so hold. Any possible collateral consequence of these convictions could occur only if the appellants should hereafter be called as witnesses in some criminal prosecution in a state court.[1] Under Mississippi law a witness may be impeached by proof of misdemeanor convictions, *Lewis* v. *State,* 1904, 85 Miss. 35, 37 So. 497; *Breland* v. *State,* 1954, 221 Miss. 371, 73 So. 2d 267. However, the witness may be asked only as to convictions; not the details of the crime. *Allison* v. *State,* Miss. 1973, 274 So. 2d 678; *Murray* v. *State,* Miss. 1972, 266 So. 2d 139; *Mangrum* v. *State,* Miss. 1970, 232 So. 2d 703. "Simple assault" includes incidents which amount to nothing more than fisticuffs and if the jury is not allowed to hear the details a conviction on that score could not have much impact on credibility; nevertheless, under *Sibron* we do not feel free to dismiss for mootness.

After their federal convictions, Smith John and Harry Smith John were indicted in the Circuit Court of Leake County, Mississippi, for an aggravated assault on Jenkins, were convicted, and sentenced to serve two years in the state penitentiary, with credit for time spent in jail awaiting trial.

[1] The convictions could not be used for impeachment in federal prosecutions, Rule of Evidence 609.

On appeal the State Supreme Court held that the United States District Court did not have jurisdiction to try the defendants under the Major Crimes Act, 18 U.S.C. § 1153, and the State Court convictions were affirmed, *John* v. *State of Mississippi* (Miss. 1977), 347 So. 2d 959. See also, *Tubby* v. *State,* Miss. 1976, 327 So. 2d 272.

Our Court deferred decision on the instant appeal pending an application of the Solicitor General of the United States for a writ of certiorari in *United States* v. *State Tax Commission of the State of Mississippi,* 5 Cir. 1974, 505 F. 2d 633, reh. denied, 535 F. 2d 300 (1976), reh. en banc denied, 541 F. 2d 469 (1976). In that case, which was not a criminal prosecution under 18 U.S.C. § 1153, we held that the jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired. On April 5, 1977, we were notified that the Acting Solicitor General had decided not to seek certiorari. He felt that the Court had incorrectly concluded that the Mississippi Choctaws are not a tribe but that this was unnecessary to the Court's resolution of the State Tax Commission controversy.

I

Jurisdiction

The threshold issue in this appeal is one of jurisdiction: did the assault on Jenkins take place "in Indian Country"?[2]

[2] 18 U.S.C. § 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a)

(Continued)

18 U.S.C. § 1151, a product of the general revision of 1948, says that "Indian Country" shall include "all lands within the limits of any Indian Reservation under the jurisdiction of the United States government". The requirement is two-fold. The land must be within an Indian Reservation and the Indian Reesrvation must be under the jurisdiction of the United States government.

The quarter section of land, one half mile square, on which Jenkins was assaulted cannot be an Indian Reservation under the jurisdiction of the United States, and thus in "Indian Country", unless this was the kind of reservation to which Congress intended that § 1151 should apply—and only then if it was under the jurisdiction of the United States government by virtue of a Proclamation of the Acting Secretary of the Interior, dated December 4, 1944, purporting to act under the authority of § 7 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984.

We hold that the lands occupied in Mississippi by its citizens of Choctaw Indian blood *are not* in Indian Country; therefore, 18 U.S.C. § 1153 [3] did not confer subject matter jurisdiction on the District Court.

(Continued)

all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.

[3] 18 U.S.C., § 1153. Offenses committed within Indian country.

"Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely,

The convictions are reversed and the cause remanded, with directions to set aside the convictions and dismiss the indictment.

BY THE ENACTMENT OF 18 U.S.C., § 1151, CONGRESS SPECIFICALLY SOUGHT TO AVOID THE CONFUSION OF CHECKERBOARD JURISDICTION, *Seymour* v. *Superintendent*, 368 U.S. 351, S. Ct. 424, 7 L. Ed. 2d 346 (1962)

On December 4, 1944, the Assistant Secretary of the Interior signed a proclamation [Federal Register, December 23, 1944, page 14,907] declaring that the Indian trust lands composed of many comparatively small, non-contiguous tracts in the Mississippi Counties of Attala, Jones, Leake, Neshoba, Newton, and

murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

"As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.

"As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed." (June 25, 1948, ch. 645, 62 Stat. 758; May 24, 1949, ch. 139, § 26, 63 Stat. 94; Nov. 2, 1966, Pub. L. 89–707, § 1, 80 Stat. 1100; Apr. 11, 1968, Pub. L. 90–284, title V, § 501, 82 Stat. 80.)

(Statute which was in effect on August 30, 1975, the date of the alleged offense.)

Scott are "an Indian reservation for the benefit of those members of the Mississippi band of Choctaw Indians, of one-half or more Indian blood, resident in Mississippi, and enrolled at the Choctaw Indian Agency as aforesaid".

The 1944 Proclamation of the Assistant Secretary will be annexed to this opinion. It will be noted that the land descriptions there set forth are filled with indefinite descriptions, such as "less 10.4 acres off the northeast part thereof", "5 acres off the east end thereof", "less 14 acres on the East side", "less 10 acres in the southwest corner", and these indefinite descriptions bristle throughout the entire description of the "reservation" which the Assistant Secretary was attempting to establish. Moreover, a comparison of sections, townships, and ranges clearly indicate that in numerous instances, even within the same county, there were not contiguous parcels of land and, in the entirety, they were scattered over several counties.

The situation is pointed up by the fact that the indictment in this case had to specify that the alleged offense occurred on a particular quarter section of land in Leake County, the Northeast ¼ of Section 35, Township 11 North, Range 7 East, an area 880 yards square.

We have not attempted to map, county by county, the lands described in the Secretary's proclamation, section by section, township by township, and range by range. We do have before us the government's Supplemental Exhibit Number 3 filed in the case of *United States* v. *State Tax Commission, supra,* purporting to be a map of Indian reservation land in the Counties of Leake, Newton, Neshoba, and Kemper.

The map shows the "Red Water" and "Standing Pine" Indian Reservations in Leake County; the

"Connehatta" Reservation in Newton County; the "Pearl River" and "Tucker" Reservations in Neshoba County; and the "Bogue Chitto" Indian Reservation in Kemper County.

The Red Water Reservation is composed of seven non-contiguous tracts; the Standing Pine Reservation is composed of five non-contiguous tracts; the Connehatta Reservation is composed of what appears to be nine non-contiguous tracts; the Pearl River Reservation seems to be composed of several non-contiguous tracts, the actual boundaries of which we cannot discern from the map; and the Bogue Chitto Indian Reservation is composed of at least four non-contiguous tracts. These five Reservations are dispersed over an area encompassing twelve hundred square miles in four counties.

In 1961, in an opinion by Mr. Justice Black, the Supreme Court held that by the enactment of 18 U.S.C. § 1151, Congress sought to avoid the confusion which would be caused by an impractical pattern of checkerboard jurisdiction which would require law enforcement officers in the area to search tract books to determine whether criminal jurisdiction over a particular offense did or did not exist, *Seymour* v. *Superintendent,* 1961, 368 U.S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346.

An examination of the land descriptions set forth in the Proclamation of the Assistant Secretary (annexed hereto) reveals that he did, in fact, proclaim an impractical checkerboard, exactly the kind which Congress sought to avoid when it enacted the revised 1948 statute defining "Indian Country".

This checkerboard was in existence, but it was not Indian Country, when Congress passed the 1948 revised statute. Since this widely dispered disarray of

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small subdivisions of land, scattered in clusters throughout several Mississippi counties, was already in existence in 1948 and Congress sought to avoid just such a situation when it enacted 18 U.S.C. § 1151 defining Indian Country, it is apparent that by the enactment of the statute Congress could not have intended it to apply to the Choctaw Indian "reservation" in Mississippi. Congress could not have had any idea that it was converting a conglomeration of such tracts into "Indian Country".

We accordingly hold that the definition in the statute does not put these lands in Indian Country.

III

"[M]embers of Tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act."

United States v. *Antelope*, 1977, —— U.S. ——, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (Footnote 7).

A. THE TERMINATION OF THE CHOCTAW INDIAN TRIBE IN MISSISSIPPI, 1830

Our starting point is the Act of March 1, 1871, and the Resolution of December 10, 1817, 3 Stat. 348, 472, admitting Mississippi as the Twentieth State of the American Union on an equal footing with the other states. This endowed the State with inherent police power over all territory and inhabitants within its exterior boundaries except where pre-empted by the federal government. From 1817 to 1830 Mississippi state police power over the Choctaw Indian Tribe, and the lands it occupied, may be said to have been pre-empted by the national government. Nevertheless, by

the Treaty of Dancing Rabbit Creek the United States formally relinquished that pre-emption.

Prior to the year 1871, the United States in its dealings with the various Indian tribes customarily resorted to treaties which were formally ratified by the United States Senate. Before the year 1830 the United States had made at least eight treaties with the Choctaw Indian Tribe. See detailed tabulation, *United States* v. *State Tax Commission of the State of Mississippi, supra,* 505 F. 2d at 639. The final treaty before the Tribe moved to the Indian Territory was signed September 27, 1830, on Dancing Rabbit Creek, near present day Macon, Mississippi. Except for the preamble, the Senate ratified the treaty on February 24, 1831, 7 Stat. 333. The Tribe ceded 10,500,000 acres, the last of its Tribal domain in Mississippi, from which nineteen counties were later formed.

Article III of the Treaty specified that "[T]he Choctaw nation of Indians *consent* (emphasis ours) and hereby cede to the United States, the entire country they own and possess, east of the Mississippi River; and they agree to move beyond the Mississippi River, early as practicable * * *".

The Treaty, however, required no Choctaw to leave his ancestral home. Permission to remain and become citizens of the states was expressly granted in Article XIV:[4]

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[4] Article XIV: Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each

> Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so * * *.

Historians agree that this was a concession to the members of the Tribe who lived in fixed habitations, who strongly opposed leaving their homes, and that without this concession tribal consent to the treaty could not have been obtained.[5]

In the beginning, one third of the Choctaws elected to remain in Mississippi; the others were moved West in 1831, 1832, and 1833. Sporadic migration continued, however, and by 1900 only 2,000 remained in Mississippi, scattered over several Central Mississippi counties.[6] Greenwood Leflore, the head chief of the Choc-

unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this Treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity.

[5] Hearings on the Treaty of Dancing Rabbit Creek before a Subcommittee of the Committee on Indian Affairs on H.R. 19, 213 (February 14, March 19, 1912, 151 pages):

"The civilized Indians were opposed to the removal because they loved their homes and did not desire to return to the barbaric life", p. 16.

"The insertion of the fourteenth article, as conclusively shown by contemporaneous testimony, was the only method by which the treaty could have been concluded", p. 17.

[6] McLemore, A History of Mississippi, 1973, p. 88. Anyone interested in the history of this noble tribe of Red men should read: DeRosier, The Removal of the Choctaw Indians, U. of Ten-

(Continued)

taw Tribe, chose not to go West, became an immensely wealthy man, and exercised his Mississippi citizenship by serving with distinction in the Mississippi Legislature.[7]

Long before 1850 the land not retained by individual Indians under Article XIV had been sold by the government at its land offices in Columbus and Paulding to private purchasers, with patents issued accordingly.

In 1921 the Supreme Court exhaustively reviewed the *post* treaty status of the Mississippi Choctaws, *Winton* v. *Amos,* 255 U.S. 373, 41 S.Ct. 342, 65 L.Ed. 684 (1921). The High Court stated that those Choctaw Indians remaining in Mississippi after the Treaty

> 1. Were subject to the laws of the State, and
>
> 2. Did not live on any reservation.

nessee Press, 1970; Debo, The Rise and Fall of the Choctaw Republic, U. of Oklahoma Press, 1961; Foreman, Indian Removal, U. of Oklahoma Press, 1953; Foreman, The Five Civilized Tribes, U. of Oklahoma Press, 1934.

[7] As a Senator, the former Chief grew tired of the well educated Senators sprinkling their speeches with lengthy quotations in Latin and Greek. He retaliated by making a speech in Choctaw, which put a stop to the former practice. He could afford to spend $75,000 of his own funds to construct a road from his home, Malmaison, in Carroll County, to his boat docks on the Yazoo. He declined to support the Confederacy. On his death bed (1866) he insisted that the United States flag be held before his eyes so that it would be the last object he saw on earth. A County (Leflore) and a City (Greenwood) were later named for him. It was the proud, and accurate, boast of the Choctaws that they had never made war on the white man; whereas, their sister tribe, the Chickasaws, delighted in fiercely thrashing the whites on the battlefield, which they often did.

By signing and ratifying the Treaty, Congress and the Indians intended and understood that the United States:

> 1. Formally relinquished its preemptive jurisdiction over these Indians who chose to remain in Mississippi, as well as over the lands they formerly occupied; and
>
> 2. Removed the pre-emption impediment to the police power of the State over the former Indian lands and the inhabitants thereof.

The State forthwith began the exercise of that power, previously asserted in a statute enacted in 1829, and thereafter uninterruptedly exercised it, all of which went unquestioned by either the federal government or the resident Indians for more than a hundred years, see *Rosebud Sioux Tribe* v. *Kneip, Governor of South Dakota,* 1977, — U.S. —, 97 S. Ct. 1361, 1371–72, 51 L. Ed. 2d. 660; *DeCoteau* v. *District County Court for Tenth Judicial District,* 1974, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300.

B

In *Winton* v. *Amos, supra,* the Supreme Court stated that the Choctaw Indians remaining in Mississippi:

> 1. Had no tribal or band organization or laws of their own;
>
> 2. The Indian Office and the Department of the Interior (1) regarded these Indians as citizens of Mississippi, (2) assumed and exercised no jurisdiction over them, and (3) never recognized them either individually or as bands.

255 U.S. at 378, 41 S. Ct. at 34.

It necessarily follows that by the Treaty of Dancing Rabbit Creek the United States deliberately ter-

minated its guardianward relationship with the Indians who chose to remain in Mississippi. And there is no doubt that these Indians accepted that termination.

> [M]embers of Tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act.

United States v. *Antelope,* — U.S. —, 97 S. Ct. 1395, 1399, 51 L. Ed. 2d 701. (Footnote 7) (1977).

Antelope cited *United States* v. *Health,* 9th Cir. 1974, 509 F. 2d 16, 19: "While anthropologically [an] Indian even after the Termination Act obviously remains an Indian, his unique status vis-a-vis the Federal Government no longer exists".

> That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation* v. *United States,* 119 U.S. 1, 27, [7 S. Ct. 75, 30 L. Ed. 306, 314,] and *Stephens* v. *Choctaw* [*Cherokee*] *Nation,* 174 U.S. 445, 483, [19 S. Ct. 722, 43 L. Ed. 1041].

Lone Wolf v. *Hitchcock,* 187 U.S. 553, 567, 23 S. Ct. 216, 222, 47 L. Ed. 299 (1903).

"Federal regulation of Indian tribes * * * is not to be viewed as legislation of a 'racial' group consisting of 'Indians'", *United States* v. *Antelope,* supra, 97 S. Ct. at 1399, citing *Morton* v. *Mancari,* 417 U.S. 535, at 553, n. 24, 94 S. Ct. 2474, 41 L. Ed. 2d 290.

C

We need not reach or decide whether Congress has the power to reconvert emancipated Indians into

wards of the government, or whether once Congress has liquidated Indian tribal status it may reestablish it regardless of intervening history, nor need we decide whether Congress may withdraw a state's police powers over territory or inhabitants once it has been conferred.

Indeed, a diligent search of the statutes has failed to unearth a single instance anywhere in the United States in which Congress has attempted such an act in connection with emancipated Indians, nor have we found any case holding that once Congress totally emancipates an Indian and remands him to the reserved police powers of a state it may thereafter at its unilateral pleasure reassume paramount, plenary jurisdiction over him and the land on which he lives in derogation of the interveningly conferred police power of the state in which the Indian resides.

Quite to the contrary, for over fifty years Congress was persistently pressed to amend, modify, or abrogate provisions of the Dancing Rabbit Treaty with reference to the Mississippi Choctaws and it uniformly declined to do it. The detailed story of these efforts and their corresponding failures appears in *Winton* v. *Amos, supra.* See also, Hearings on the Treaty of Dancing Rabbit Creek before a Subcommittee of the Committee on Indian Affairs, U.S. House of Representatives on H.R. 19213 (February 14–March 19, 1912, 151 pages). See, also, the detailed history recited by Rep. Scott Ferris of Oklahoma on the floor of the House, Congressional Record, Sixty Fifth Congress, Second Session, Vol. 56, part 2, page 1140.

Mr. Ferris asserted that four Secretaries of the Interior, the Dawes Commission, and the House of Representatives, four times by affirmative vote, had held

that the Choctaw Indians who remained in Mississippi were not entitled to share in the Indian lands of Oklahoma.

Section 18 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, recognized that the Choctaw Indian Tribe was located in the State of Oklahoma and the Tribe was expressly excluded from the provisions of §§ 16, 17, and 18 of the Act for reorganization and self government.

The Gratuity of 1918

The illustrious John Sharp Williams (assisted by Honorable Pat Harrison and others then members of an outstandingly able Mississippi delegation in the House of Representative) labored diligently for years to obtain congressional relief for the Mississippi Choctaws as a matter of right under Article XIV. These efforts failed.

At long last, 88 years after the Treaty of Dancing Rabbit Creek, relief came, not as a matter of right but as a gratuity, in the Indian appropriations bill of May 25, 1918, 40 Stat. 561, 562.[8] The bill referred

[8] For the relief of distress among the full-blood Choctaw Indians of Mississippi, including the pay of one special agent, who shall be a physician, one farmer, and one field matron, $5,000; for their education by establishing and maintaining day schools including the purchase of land and the construction of necessary buildings, $20,000; for the purchase of lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians, to be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States, under such rules and regulations as he may direct, $25,000; for the purpose of encouraging industry and self-support among said Indians and to aid them in building homes, in the culture of fruits, grains, cotton, and other

(Continued)

to the "full-blood Choctaw Indians of Mississippi" and to "the relief of [their] distress". It did not refer to them as a tribe. It does not mention a reservation, for there was none. The Commissioner of the Bureau of Indian Affairs, pursuant to a prior appropriation, had been sent to investigate the condition of the Mississippi Choctaws and had formally reported that they did not live on a reservation and he expressly declined to recommend that Congress create one.[9] The bill says nothing about halting state police power over the Indians.

The appropriation was what it declared itself to be: a relief measure, limited to individual Choctaws of the full blood. Only $75,000 was appropriated and it was provided that portions of that sum should be

crops, $25,000, which sum may be used for the purchase of seed, animals, machinery, tools, implements, and other equipment necessary, in the discretion of the Secretary of the Interior, to enable said Indians to become self-supporting, to be expended under conditions to be prescribed by the said Secretary for its repayment to the United States on or before June thirtieth, nineteen hundred and twenty-five; in all, $75,000, to be immediately available.

40 Stat. 573, § 9.

[9] According to the Commissioner's report he spent a great deal of time visiting the Indians, particularly in the Counties of Neshoba and Newton. He reported that "the Choctaws of Mississippi have a very good name as regards honesty, truthfulness, cleanliness, and general morality", adding that "I am not prepared to advocate a reservation for these people".

The Commissioner told that he had asked an aged Choctaw how he would like it if the government were to provide him with a team of mules and a wagon. The Indian replied that he would prefer to continue using the hoe because it did not eat and would not be taxed. From the vantage point of 1977 it would appear that this elderly Red Man was in some respects a very wise individual.

Congressional Record, Sixty-fifth Congress, Second Session, Volume 56, Part 2, Page 1138.

repaid by the Indians, although it appears that almost no repayment was ever made.

Representative Charles D. Carter, born in 1868 near Boggy Depot, in the Choctaw Nation, Indian Territory, said on the floor of the House that *the appropriation was a gratuity.* Congressional Record, Sixty-fifth Congress, Second Session, Vol. 56, part 2, page 6686.

Rather than reflecting a Congressional purpose to amend the Treaty, the lengthy debate on this appropriation demonstrated a fixed Congressional purpose not to alter the Dancing Rabbit Treaty insofar as it pertained to the Mississippi Choctaws.

It is hardly a matter of surprise that, smothered like their white brethren with a hazardous cotton economy and with discriminatory freight rates which stifled industrial development, within a period of nearly twenty years the Mississippi Choctaws paid only $295.11 on the lands which the government bought for them. Congress found it advisable to *place title* to the 3,009 acres acquired under the Act of May 25, 1918, and subsequent similar acts, in the United States "in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior," Act of June 21, 1939 [53 Stat. 851].[10]

[10] An act, to define the status of certain lands purchased for the Choctaw Indians, Mississippi.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi under authority contained in the Act of May 25, 1918 (40 Stat. L., 573), and similar subsequent Acts not under contract for resale to Choctaw Indians, or on which existing contracts of resale may hereafter be cancelled, is hereby

(Continued)

This, of course, freed the lands from local, county, and state ad valorem taxation, like other federally owned land, but neither the Committee Report nor the Act says that the emancipated Mississippi Choctaws were thereby made an Indian tribe, or that the lands were to constitute an Indian Reservation (widely scattered as they were), or that Congress was attempting to oust the State of its police power over either the land or individual Indians, any of which could easily have been stated if Congress had had such a purpose.

The Assistant Secretary's 1944 Proclamation, discussed *ante,* was yet five years out in the future. The 1948 Indian Country statute, 18 U.S.C. § 1151, was nine years off. We cannot strain for the implication that Congress in 1939 anticipated either occurrence. The Secretary's letter to the Committee mentioned the possibility that some time in the future these Indians might organize under the Indian Reorganization Act of 1934, but he emphasized that the present purposes of the proposed legislation were that (1) all the Indians could be treated alike, (2) that administrative problems would be avoided, and (3) a more productive use of the lands could be sought. To assume that Congress acted on mere possibilities of future events would be pure speculation.

It is a cardinal rule that repeals by implication are not favored, that in the absence of some affirmative showing of an intention to repeal the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable, and in the

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declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

Approved, June 21, 1939.

absence of a clear intention to the contrary a specific statute will not be controlled on nullified by a general one, regardless of the priority of enactment, *Morton* v. *Mancari, supra,* 417 U.S. at 550–51, 94 S. Ct. at 2482, 2483.

We therefore hold that the specific provisions of the Treaty of Dancing Rabbit Creek with reference to the Mississippi Choctaws were not amended, modified or abrogated by the within described Acts of Congress, 1918–1939. We further hold that while the citizens of the State of Mississippi of Choctaw Indian blood are, anthropologically, Indians they are nevertheless subject to the inherent police powers of the State anywhere within its exterior boundaries.

D. THE SECRETARY'S PROCLAMATION OF DECEMBER 4, 1944 DOES NOT ALTER THE RESULT

Notwithstanding the considerations hereinabove discussed, the government argues that

> However, a new reservation involved in this case was established in 1939, pursuant to § 7 of the Indian Reorganization Act of June 18, 1934 * * * for those Choctaws, of one-half or more Indian blood, remaining in Mississippi. (Brief p. 23).

The insuperable difficulty with this contention is that the Indian Reorganization Act of 1934 was not intended to apply, and does not apply, to the Mississippi Choctaws.

As the unanimous opinion in *Morton* v. *Mancari, supra,* pointed out, 94 S. Ct. at 2478, the overriding purpose of the Act was to establish machinery whereby *Indian tribes* would be able to assume a greater degree of self government; that Congress was seeking

to modify the then-existing situation whereby the Bureau of Indian Affairs "had plenary control, for all practical purposes, over the lives and destiny of the *federally recognized Indian tribes* (emphasis ours)."

The Court further said that the ultimate solution adopted by the Act was "to strengthen tribal government while continuing the active control of the [Bureau of Indian Affairs], with the understanding that the Bureau would be more responsive to the interests of the people it was created to serve". *Ibid.*, at 2479.

Quite obviously, Congress in 1934 was legislating for Indians in the government-guardian-ward relationship, and not for long emancipated individuals outside that relationship.

We therefore conclude that the Indian Reorganization Act is of no relevancy to the appropriate disposition of this case. It provided no authority for the Proclamation of the Assistant Secretary in 1944. For that reason alone, the reservations of the Mississippi Choctaws are not in "Indian Country".

And, even if the Assistant Secretary did have that authority, there is nothing in the 1934 Act evidencing an intent on the part of Congress to amend, modify or abrogate the Treaty of Dancing Rabbit Creek or, at one fell swoop, to erase a century of history.

IV

This raises the cry in the briefs that the Court is annulling the reservations for the Mississippi Choctaws and invalidating the connection being maintained with and for the Mississippi Choctaws by the United States Government.

As will shortly be seen this is not at all so.

V

> [C]ourts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

Morton v. *Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 2483, 41 L. Ed. 2d 290.

The position of the government is that we should look at this case with one eye closed. It plays down the irrefutable fact that sixty years ago Congress decided to embark upon a policy of benevolences and gratuities to the Mississippi Choctaws, not as a matter of right, not because of the existence of the government-guardian-ward relationship which ordinarily implies preemption and exclusive jurisdiction, but because, as the 1918 debates unmistakably show, Congress had come to the conclusion that these people, the long separated remnant of a noble tribe of Red Men, were morally entitled to help. By its annual appropriations Congress knows that the funds are being administered by the executive offices of the government, that the appropriations for the Mississippi Choctaws are being administered with a "reservation" approach, and that affairs are being conducted as if the Indian Reorganization Act of 1934 did apply. All this is policy inaugurated and implemented by the Executive, in which Congress has concurred so far as appropriations go, without Congress manifesting the slightest suggestion that an attempt to abrogate Mississippi police power over this relatively small number of citizens and over the fragmented "reservations" is a prerequisite to what is being done as a moral, rather than legal obligation. The 1918 policy was begun at a time

when Congress knew that the Mississippi Choctaws had been emancipated in 1831, were not an Indian tribe, and had no reservation. The congressional policy of helping these people simply does not depend on the 1934 Act or the 1939 Act or the 1944 Proclamation, vainly invoked by the government in an effort to support its contention that this is Indian Country.

Our holding that this is not Indian Country in no way affects the legality of the aid being given this group. What Congress is doing here in no way differs from federal aid to drouth-stricken farmers or to flood stricken communities or to small businessmen or to anybody else for whom Congress finds a good reason to extend the assistance of the taxpayers represented by it. That which is being done to assist the Mississippi Choctaws does not depend, and it does not have to depend, on the traditional "federal guardian"—"Indian ward" relationship.

VI

The Result

We hold that the lands in the various tracts of the Mississippi Choctaw Indian "Reservation" are not within "Indian Country", as contemplated by 18 U.S.C. §§ 1151, 1153. We further hold that to date the inherent police power of the State of Mississippi over its emancipated Indian citizens of Choctaw blood stands unimpaired. This, however, has nothing to do with the legality of the congressional policy of benevolence toward the Mississippi Choctaws as begun in 1918 and since pursued.

The District Court was without subject matter jurisdictions of these prosecutions.

The convictions are reversed. The case will be remanded to permit the District Court to set them aside and dismiss the indictment.

REVERSED and REMANDED.

Appendix

Office of Indian Affairs.

LANDS ACQUIRED FOR THE BENEFIT OF CHOCTAW INDIANS IN MISSISSIPPI

PROCLAMATION

Whereas, prior to June 18, 1934, and pursuant to authority of and with funds made available by the act of May 25, 1918 (40 Stat. 573), and several subsequent similar acts, approximately 3,550 acres of lands in Mississippi were purchased for the use and benefit of Choctaw Indians of that State;

And whereas, the act of June 21, 1939 (53 Stat. 851) provides:

That title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi, under authority contained in the Act of May 25, 1918 (40 Stat. L., 573), and similar subsequent Acts, not under contract for resale to Choctaw Indians, or on which existing contracts of resale may hereafter be canceled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

And whereas, on March 30, 1935, the Choctaw Indians resident in Mississippi, of one-half or more

Indian blood, pursuant to section 19 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) voted to accept the provisions of that act, and subsequently pursuant to Section 5 of said act, approximately 11,600 acres of additional land in Mississippi have been acquired for the use and benefit of the Choctaw Indians of one-half or more Indian blood, resident in that State, the title having been taken in the name of the United States in trust for said Choctaw Indians;

And whereas, none of the previously acquired lands for the benefit of the aforesaid Choctaw Indians is now covered by any outstanding contract or contracts for the resale of any part thereof to any Choctaw or other Indian;

Now therefore, by virtue of the authority contained in the act of June 21, 1939, and in section 7 of the act of June 18, 1934, I hereby declare that the lands in Mississippi acquired by the United States prior to June 18, 1934, for the benefit of the Choctaw Indians of that State are now held in trust by the United States for the benefit of those Choctaw Indians of one-half or more Indian blood resident in that State on January 1, 1940, as shown by the census rolls of the Choctaw Indian Agency, Mississippi, and such other Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as the recognized tribal authorities of the Mississippi Band of Choctaw Indians, with the approval of the Secretary of the Interior, find to be entitled to membership therein; and I hereby further declare that the approixmately 11,600 acres of additional land in Mississippi, acquired since June 18, 1934, for the benefit of the Choctaw Indians of that State are hereby added to the land previously acquired and such lands are hereby

declared to be an Indian reservation for the benefit of those members of the Mississippi Band of Choctaw Indians, of one-half or more Indian blood, resident in Mississippi and enrolled at the Choctaw Indian Agency as aforesaid.

For convenient identification a legal description of the areas of land acquired for the benefit of the Choctaw Indians and covered hereby, is hereto appended as Exhibit A which is made a part hereof to the same extent as though set forth in full herein.

Done at the City of Washington, District of Columbia, this 4th day of December, 1944.

OSCAR L. CHAPMAN,
Assistant Secretary.

EXHIBIT A—LANDS ACQUIRED FOR THE BENEFIT OF THE CHOCTAW INDIANS IN MISSISSIPPI

Lands Acquired Prior to 1934

Attala County—Choctaw Meridian

	Area (acres)
T. 13 N., R. 7 E.:	
Beginning 26 chains and 50 links due south of the NE corner of Sec. 3 which corner is evidenced by a Sweet Gum 12 I.D. N. 2 degrees E. 25 links; and a Post Oak 20 I.D. S. 36 degrees W. 66 links on Section line between sections 2 and 3, T. 13 R 7 E., and running thence due west 3 chains and 31 links to NW corner of this block which is evidenced by a pine 12 I.D. S. 67 degrees East and Ash 12 I.D. S. 7 degrees, East 38 links. Thence due south 26 chains and 50 links to SW corner of said block, which is evidenced by a Cherry 4 I.D. S. 39 degrees, East 22 links, and a Red Elm S. 77 degrees, East 24 links, both being on West bank of ditch. Thence due east 15 chains and 11 links to SE corner of said block, which is evidenced by a Red Elm 12 I.D. N. 13 degrees, West 8 links, and a Sweet Gum 12 I.D. due North 12 links, thence due north 26 chains and 60 links, to NE corner of said	

	Area (acres)
T. 13N., R. 7E.—Continued	
block, which is evidenced by a Sweet Gum 6 I.D. S. 69 degrees, East 3 links, on East side of ditch and a Sweet Gum 4 I.D. S. 45 degrees West 12 links, making the corner in the center ditch. Thence due West 11 chains and 80 links to point of beginning. Containing by survey 40 acres. 31 27/100 acres being partly in W½NW¼ and partly in W½SW¼ of Sec. 2 and 8 73/100 acres partly in NE¼ corner of E½SE¼ and E½NE¼ of Sec. 3. All bearings by Choctaw Cession of 1830	40

Jones County—St. Stephens Meridian

T. 9 N., R. 10 E.:	
Sec. 4, SW¼NW¼, and that part of NE¼SW¼ which lies north of the old Shubuta and Ellisville Road	50
Sec. 5, SE¼NE¼	40
T. 10 N., R. 10 E.:	
Sec. 34, NE¼NE¼, N½NE¼NW¼, W½NW¼NW¼, NE¼NW¼NW¼, S½NW¼N½NE¼SW¼, S½SW¼NE¼, N½NW¼SE¼	230
	320

Leake County—Choctaw Meridian

T. 9 N., R. 8 E.:	
Sec. 2, NE¼SW¼, W½NW¼, SE¼NW¼ less 10 1/7 acres off the NE part thereof	149½
T. 10 N., R. 8 E.:	
Sec. 26, S½NW¼SE¼, E½SW¼, 5 acres off the east end of S½NW¼SW¼	106
Sec. 34, S½SE¼ less 14 acres on the East side NW¼-NE¼, N½SE¼	186
Sec. 35, NE¼SW¼	40
T. 11 N., R. 7 E.:	
Sec. 23, SW¼NE¼ less 10 acres in SW corner, one acre in NE corner of NW¼SE¼ and 1 acre in NW corner of NE¼SE¼	32
Sec. 26, W½SW¼SW¼, NW¼NW¼, N½NE¼	140
Sec. 27, NE¼NE¼, E½SE¼	120

	Area (acres)
T. 11N., R. 7E.—Continued	
Sec. 35, SW¼SE¼, S½NW¼SE¼ less 2 acres on east side, E½NE¼, NW¼NE¼, NE¼SE¼ less 10 acres on east side	208
Sec. 36, W½NW¼NW¼, SW¼NW¼	00
	1,000

Neshoba County—Choctaw Meridian

T. 10 N., R. 11 E.:	
Sec. 5, S½NE¼	80
Sec. 6, NW¼SE¼ less 1 acre in NE corner	89
T. 10 N., H. 12 E.:	
Sec. 17, SE¼SE¼	40
Sec. 20, N½NE¼, SE¼NE¼	120
T. 11 N., R. 10 E.:	
Sec. 23, SE¼SE¼	40
Sec. 24, W½W½SW¼	40
Sec. 25, SW¼SE¼, NW¼NW¼, SE¼SW¼, W½SW¼, 12 acres off south end of NW¼SW¼	172
Sec. 27, W½SW¼	80
Sec. 36, N½NE¼NE¼, E 60 acres of E½NW¼, N 2 acres of S½NE¼NE¼	82
T. 11 N., R. 11 E.:	
Sec. 19, SE¼SE¼, SW¼SE¼, E½E½NW¼, S½-SE¼SW¼, W½NW¼SE¼	160
Sec. 30, NE¼	160
Sec. 31, NE½NW¼	80
T. 11 N., R. 13 E.:	
Sec. 1, NE¼SW¼	40
Sec. 2, E½NW¼, W½NE¼	160
Beginning at NE corner of Sec. 2 running South 740 yards, thence west 75 yards, thence north 43 yards, thence west 365 yards, thence north 697 yards to north line of Sec. 2, thence east 440 yards to place of beginning	63. 9
T. 12 N., R. 13 E.:	
Sec. 35, S½SE¼	80
Sec. 36, W½SE¼ less 4 acres in SE corner	76
	1, 512. 9

Newton County—Choctaw Meridian

	Area (acres)
T. 7 N., R. 10 E.:	
Sec. 2, W½NW¼, N½SW¼	160
Sec. 3, NE¼, N½SE¼, SE¼SW¼	280
Sec. 10, NW¼NW¼ less 10 acres off south side	30
Sec. 11, NE¼SW¼	40
Sec. 14, S½SW¼	80
Sec. 15, S½SE¼NW¼, N½SW¼, SW¼NW¼ less 5 acres in NE corner, 2 acres in NE corner of SE¼SW¼	137
Sec. 23, NE¼NW¼	40
	767

Land Acquired Subsequent to 1934

Kemper County—Choctaw Meridian

T. 11 N., R. 14 E.:	
Sec. 7, W½SW¼	80
Sec. 18, strip 1 acre wide and 3 acres long in NW corner NW¼NW¼	3
T. 11 N., R. 16 E.:	
Sec. 7, N½SE¼, NE¼SW¼, N½SE¼SW¼	140
	223

Leake County—Choctaw Meridian

T. 11 N., R. 7 E.:	
Sec. 23, S½SE¼ lying east of Carthage-Kosciusko Highway, containing 15 acres more or less; N½SE¼ less 1 acre in SW corner thereof, less about 2 acres beginning at NE corner of NW¼SE¼; thence west 25 yards; thence south 97 yards; thence east 100 yards; thence north 97 yards; thence west 75 yards to point of beginning; SW¼SW¼NE¼; 4 acres in NE corner of NE¼SW¼	106
S½SE¼ lying west of Carthage-Kosciusko Federal Highway, about 65 acres more or less, and 1 acre in SW corner of NW¼SE¼	66

	Area (acres)
T. 11 N., R. 7 E.—Continued	
Sec. 35, All that part of NW¼SE¼ which lies east of old Thomastown Road, 10 acres more or less, and tract of 15 acres more or less, situated in NW corner of NW¼SE¼, described as beginning at NW corner of said NW¼SE¼ and run south 220 yards, thence east to old Thomastown Road, thence in NW course along said road to the north line of said NW¼SE¼, thence west to point of beginning	25
Sec. 36, W½SW¼SE¼	20
T. 10 N., R. 8 E.:	
Sec. 26, SW¼SE¼, SE¼SE¼ less 2 acres in NE corner, 12 acres in S½ and across south end of SW¼SW¼	90
Sec. 27, SW¼SE¼	40
Sec. 35, E½NW¼NW¼, NE¼NW¼ less 5 acres on east side, E½NE¼SE¼	75
Sec. 36, NW¼SW¼, less 3 acres across south side of the big ditch	37
T. 11 N., R. 8 E.:	
Sec. 30, about 3 acres in SW corner of SE¼SW¼	3
Sec. 31, E½NW¼, W½NE¼, NW¼SE¼ less a strip 40 ft. wide on south side; W½SW¼SE¼	219
	681

Neshoba County—Choctaw Meridian

T. 10 N., R. 11 E.:	
Sec. 6, NE¼SE¼	40
T. 10 N., R. 12 E.:	
Sec. 9, SE¼SE¼	40
Sec. 14, NW¼SW¼	40
Sec. 15, N½NW¼, SE¼NW¼, SW¼ less 3 acre Baptist Church site in NE corner; and 3.7 acres in SE corner	280.7
Sec. 20, NE¼NW¼, SW¼NE¼, N½NW¼SE¼ less 2 acres in NW corner of NE¼NW¼	98
Sec. 21, NE¼, N½SW¼, NW¼SE¼	280
Sec. 22, NW¼NW¼, NE¼NW¼NE¼, S½NW¼NE¼, SW¼NE¼	110
Sec. 23, W½SE¼	80

T. 11 N., R. 10 E.—Continued	Area (acres)
Sec. 1, all south of Pearl River	108
Sec. 2, all south of Pearl River	142
Sec. 3, all south of Pearl River	101
Sec. 4, all that part of SE¼SE¼ south of Pearl River	35
Sec. 8, all section 8 east of Pearl River	269
Sec. 9, NW¼, S½SW¼, NW¼SW¼, E½NE¼, SW¼-NE¼, S½NW¼NE¼, W½SE¼	500
Sec. 10, all	640
Sec. 11, N½N½, SW¼NE¼, N½SE¼NE¼, SW¼-NW¼, less 2 acres in SW corner and 22 acres in NE corner of NW¼SW¼	282
Sec. 12, E½, NW¼, S½SW¼	560
Sec. 13, W½, SE¼SE¼, N½S½NE¼, N½NE¼, W½-SE¼	560
Sec. 14, SW¼SW¼, E½NE¼, SW¼NW¼, S½NE¼-SW¼, NW¼SW¼, SE¼SW¼, SE¼	420
Sec. 15, SE¼SE¼, NE¼, E½NW¼	280
Sec. 17, NE¼NE¼	40
Sec. 18, SE¼SW¼, S½SW¼, SE¼	60
Sec. 19, E½NW¼	80
Sec. 21, E½NE¼, E½W½NE¼, E½SE¼	200
Sec. 22, N½, SE¼, E½SW¼, SW¼SW¼, 15 acres off south side of NW¼SW¼, N½SW¼, SW¼	635
Sec. 23, W½W½, SE¼SW¼	200
Sec. 24, E½, E½W½, E½W½SW¼	520
Sec. 25, SE¼NE¼ less 3 acres in SW corner, 1 acre in NE corner NE¼SE¼	33
Sec. 26, NE¼NW¼, NW¼NE¼ less 10 acres across east side	70
Sec. 27, all land north of Philadelphia & Edinburg Highway in NE¼NW¼, N½NW¼NW¼, 2 acres more or less in NW corner of S½NW¼NW¼, NE¼-NE¼, that part of NW¼NE¼ north of highway 16	85
Sec. 28, E½NE¼, W½NW¼ less 3 acres in NW corner & less 8 acres in SW corner and E½NW¼	229
Sec. 36, W½W½SE¼NW¼, S½SW¼NW¼, S½N½-SW¼NW¼, W½NE¼, SE¼NE¼, south 18 acres of NE¼NE¼, W½SE¼, SE¼SW¼, S½NE¼SW¼	318

T. 11 N., R. 11 E.:	Area (acres)
Sec. 19, NE¼SE¼, E½NW¼SE¼, W½SW¼, NE¼-SW¼, N½SE¼SW¼, W½W½NW¼, E½SW¼-NE¼	260
Sec. 30, W½W½NW¼, 1 acre in NW corner NW¼-SW¼, SE¼NW¼, E½SW¼NW¼, 2 acres starting in NW corner of E½NW¼SW¼, E½SW¼SW¼, SE¼SW¼, NE¼NW¼, E½NW¼NW¼	223
Sec. 31, S½NW¼	80
T. 11 N., R. 13 E.:	
Sec. 1, NW¼NE¼, west 6 acres of NE¼NE¼, north 6 acres of SW¼NE¼	52
Sec. 2, W½NW¼, NW¼SE¼, NE¼SW¼	160
Sec. 3, NE¼	160
T. 12 N., R. 13 E.:	
Sec. 35, S½NE¼, N½SE¼, E½SW¼	240
Sec. 36, SW¼NE¼, W½SW¼, NE¼SW¼, SW¼-NW¼, 4 acres in a square in the SE corner of SW¼-SE¼	204
	8,719.7

Newton County—Choctaw Meridian

T. 7 N., R. 10 E.:	
Sec. 3, NE¼SW¼, S½SE¼	120
Sec. 4, SW¼SE¼, N½NW¼	120
Sec. 5, NE¼NE¼	40
Sec. 8, NW¼, N½NE¼SW¼ less 2 acres, SE¼SW¼, S½NE¼SW¼ less 2 acres	236
Sec. 9, NE¼NE¼	40
Sec. 10, W½NE¼ and 6 acres off north side of NW¼SE¼ and NW¼ less 30 acres off north side of NW¼NW¼, NE¼NE¼	256
Sec. 14, NW¼NW¼, S½NW¼, N½SW¼	200
Sec. 15, SW¼NE¼, NE¼NW¼ less 1 acre in NE corner	79
Sec. 20, E½SW¼, NW¼SW¼, W½SE¼, SE¼SE¼ less 1 acre in NE corner thereof, S½NE¼, SE¼NW¼,	

	Area (acres)
T. 7 N., R. 10 E.—Continued	
S½NW¼NE¼, S½NE¼NW¼, SE¼NW¼NW¼--	409
Sec. 21, N½SE¼----------	80
Sec. 22, E½NW¼----------	80

Beginning at a point on the east line of NE¼SW¼ of Sec. 9, said point being 5 chains north of the SE corner of said NE¼SW¼, and run thence south to the SE corner of SE¼SW¼ of said sec. 9, thence west to the SW corner of SW¼SW¼ of said sec. 9, thence south along the east line of NE¼NE¼ of sec. 17, 5 chains and 33 links, thence west and parallel with the north line of said NE¼NE¼ of said sec. 17, 5 chains and 33 links, thence north 23 chains to the intersection of Box Creek as same presently runs, thence in an easterly direction along the center of Box Creek as same presently runs to a point where Box Mill Branch joins said Box Mill Creek, as same now runs, thence in an easterly direction along the center of Box Mill Branch as same now runs to the east line of NE¼-SE¼ of sec. 8, thence north along the east line of said NE¼SE¼ of said sec. 8, to a point due west of a point in the center of the lake and Philadelphia Public Road as same now runs, said point being 5 chains north of the intersection of the center of Box Mill Branch as same now runs and the center of Lake and Philadelphia Public Road as same now runs, thence east to a point in the center of the Lake and Philadelphia Road as same now runs, said point being 5 chains north of the intersection of the center of Box Mill Branch as same now runs and the center of the Lake and Philadelphia Public Road as same now runs, thence south along the center of the Lake and Philadelphia Public Road as same now runs 5 chains to the intersection of the center of said Lake and Philadelphia Public Road with the center of Box Mill Branch as same now runs, thence easterly along the center of Box Mill Branch as same now runs to a point due west of point of beginning, thence east to point of beginning, and being wholly within and a part of SW¼ of sec. 9, NE¼NE¼ of sec. 17, and SE¼ of sec. 8.

	Area (acres)
T. 8 N., R. 10 E.:	
Sec. 32, SE¼SE¼----------	-----
Sec. 33, SW¼ less and except that part lying and being north of Canal.	-----
Total ----------	1,983

Scott County—Choctaw Meridian

T. 8 N., R. 9 E.:	
Sec. 34, S½E¼NW¼----------	20
T. 11 N., R. 7 E.:	
Sec. 22, NW¼NE¼NE¼----------	10
Sec. 23, SW¼NW¼, NW¼SW¼----------	80
	110

[F. R. Doc. 44-19063; Filed, Dec. 15, 1944, 3:38 p. m.]

APPENDIX B

United States Court of Appeals for the Fifth Circuit

No. 76-1518

D.C. Docket No. J-75-68(C)-CR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

SMITH JOHN AND HARRY SMITH JOHN, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Southern District of Mississippi

Before Coleman, Godbold and Hill, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

OCTOBER 11, 1977.

Issued as Mandate: NOVEMBER 2, 1977

APPENDIX C

United States District Court, Southern District of Mississippi, Jackson Division

UNITED STATES OF AMERICA

v.

SMITH JOHN AND HARRY SMITH JOHN

Criminal No.: J75-68(C)

AGREED STATEMENT OF FACTS ON APPEAL

Pursuant to the terms of Rule 10(d) of the Federal Rules of Appellate Procedure, the parties hereto, believing that the questions presented by the appeal herein of Smith John and Harry Smith John from the order denying defendants' Motion to Arrest Judgment rendered in the United States District Court for the Southern District of Mississippi, Jackson Division, in this cause on the 6th day of February, 1976, can be determined by the United States Court of Appeals for the Fifth Circuit without an examination of all the pleadings, evidence and proceedings in the Court below, present this statement of the case showing how the questions arose and were decided in said District Court, and proved as are essential to a decision of said Court of Appeals as follows:

> The defendants were initially proceeded against by an indictment which charged "That SMITH JOHN, an Indian, and HARRY SMITH JOHN, an Indian, on or about August 30, 1975, in Leake County, Mississippi, in the NE ¼ of Section 35, Township 11 N, Range 7

E, in the Jackson Division of the Southern District of Mississippi on and with the Choctaw Indian Reservation and on land within the Indian country under the jurisdiction of the United States of America, did then and there knowingly, willfully, unlawfully and feloniously assault with intent to kill the person of Artis Jenkins, in violation of Sections 1153 and 113 (a), Title 18, United States Code.

Arraignment was held on October 24, 1975, and pleas of "not guilty" were entered by both defendants. Trial was held on December 8–9, 1975 and after both the government and the defense rested, instructions were requested of the court. Government attorneys requested instructions on assault with intent to kill and an assault with intent to do bodily harm, and without just cause or excuse; the federal statutory provisions being 18 U.S.C. §§ 113(a) and (c) respectively. The defense requested an additional instruction on simple assault, as defined in 18 U.S.C. § 113(e). No objection was made to the defendants' requested instruction on simple assault and the court granted instructions on all three provisions.

After deliberating, the jury returned verdicts of "not guilty" for both defendants on charges of assault with intent to kill and of assault with intent to do bodily harm, and without just cause or excuse. The two defendants were, however, found guilty of having committed simple assault.

On December 15, 1975, both defendants were sentenced to 90 days in jail and $300.00 fines and on the same date a timely Motion in Arrest of Judgment was filed on their behalf. The motion charges that the court was without jurisdiction of the offenses of

which the defendants were found guilty. The prosecutions were brought under the authority of 18 U.S.C. §§ 1151 and 1153 which together provide that federal courts shall have exclusive jurisdiction over certain enumerated crimes including assault with intent to kill and assault resulting in serious bodily injury when committed by American Indians within lands designated as "Indian Country". The defense contended that simple assault not being one of those enumerated crimes under the Major Crimes Act, the court was without jurisdiction to sentence Indian defendants found guilty of such charges. The Motion in Arrest of Judgment was heard on February 6, 1976, and denied. This appeal is being taken only from the order denying defendants' Motion in Arrest of Judgment.

FINDINGS OF FACT

* * * * *

CONCLUSIONS OF LAW

* * * * *

The Order denying defendants' Motion in Arrest of Judgment was filed on February 10, 1976.

Notice of appeal was filed February 18, 1976.

The judgment appealed from and notice of appeal, and a concise statement of the points to be relied upon by appellant are as follows:

JUDGMENT APPEALED FROM

* * * * *

NOTICE OF APPEAL

* * * * *

STATEMENT OF POINTS

(1) The Court below erred in denying defendants' Motion in Arrest of Judgment and in holding that it

had jurisdiction to sentence American Indians convicted of simple assault within "Indian Country" consequent to prosecutions instituted under 18 U.S.C. §§ 1151 and 1153.

EDWIN R. SMITH,
Attorney for the Defendants.

MEMORANDUM

Harry Smith John having been permitted to proceed as one who was financially unable to obtain adequate defense in a criminal case and Smith John having filed for leave to proceed in forma pauperis, no bond for costs on appeal is required.

It is further agreed and stipulated by the undersigned, who are the attorneys for the defendants and for the government respectively, that the above is the material evidence in the case and that the facts as stated above may be regarded as true by the United States Court of Appeals for the Fifth Circuit and this agreed case shall be taken by the Court as the record on appeal in this case.

EDWIN R. SMITH,
Attorney for Defendants.
DANIEL L. LYNN,
Attorney for the Government.
DANIEL E. LYNN,
Assistant U.S. Attorney.

Approved this 1st day of April, 1976, and ordered when filed in the office of the Clerk of this Court to be certified to the United States Court of Appeals for the Fifth Circuit as the record on appeal.

HAROLD COX,
United States District Judge.

APPENDIX D

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT, OFFICE OF THE CLERK,
New Orleans, La., July 19, 1976.

No. 76-1518—*United States of America vs. Smith John and Harry Smith John.*

Mr. ROBERT E. HAUBERG,
United States Attorney,
P. O. Box 2091,
Jackson, Mississippi 39205

DEAR MR. HAUBERG: The Court desires a brief, prepared by the United States Department of Justice, on the issue of whether the District Court had jurisdiction under 18 U.S.C. § 1153, to try this case at all; more particularly whether the scene of the alleged offense is in Indian Country as included in the above statute.

The brief is to be filed no later than September 15, 1976. No extension can be granted, because the case is now tentatively assigned for October 4, 1976 at Jackson, Mississippi.

Very truly yours,

EDWARD W. WADSWORTH,
By: GILBERT F. GANUCHEAU,
Clerk,

cc: Mr. Edwin R. Smith.

APPENDIX E

Section 1151 of Title 18, United States Code, 62 Stat. 757, 63 Stat. 94, provides:

SECTION 1151. INDIAN COUNTRY DEFINED

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Section 1153 of Title 18, United States Code, 62 Stat. 758, 63 Stat. 94 has been amended, by Section 2 of the Act of May 29, 1976, Pub. L. 94–297, 90 Stat. 585. On August 30, 1975, the date of the alleged offense, Section 1153 provided:

SECTION 1153. OFFENSES COMMITTED WITHIN INDIAN COUNTRY

Any Indian who commits against the person or property of another Indian or other person

any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.

As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed.

Sections 5, 7, 16 and 19 of the Indian Reorganization Act (the Wheeler-Howard Act), 48 Stat. 984–988, 25 U.S.C. 465, 467, 479, provide:

Section 5. [25 U.S.C. 465, 48 Stat. 985.] The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing res-

ervations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided,* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H. R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Section 7. [25 U.S.C. 467, 48 Stat. 986.] The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided,* That lands added to

existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

Section 16 [25 U.S.C. 476, 48 Stat. 987.] Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

> Section 19 [25 U.S.C. 479, 48 Stat. 988.] The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Section 9 of the Act of May 25, 1918, 40 Stat. 573, provides:

> For the relief of distress among the full-blood Choctaw Indians of Mississippi, including the pay of one special agent, who shall be a physician, one farmer, and one field matron, $5,000; for their education by establishing and maintaining day schools including the purchase of land and the construction of necessary buildings, $20,000; for the purchase of lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians, to be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States, under such rules and regulations as he may direct, $25,000; for the purpose of encouraging industry and self-support among said Indians and to aid them in building homes, in the culture of fruits, grains, cotton, and

> other crops, $25,000, which sum may be used for the purchase of seed, animals, machinery, tools, implements and other equipment necessary, in the discretion of the Secretary of the Interior, to enable said Indians to become self-supporting, to be expended under conditions to be prescribed by the said Secretary for its repayment to the United States on or before June thirtieth, nineteen hundred and seventy-five; in all, $75,000, to be immediately available.

The Act of June 21, 1939, 53 Stat. 851, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi, under authority contained in the Act of May 25, 1918 (40 Stat. L., 573), and similar subsequent Acts, not under contract for resale to Choctaw Indians, or on which existing contracts of resale may hereafter be canceled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

APPENDIX F

UNITED STATES
DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, April 8, 1935.

MEMORANDUM FOR THE COMMISSIONER OF INDIAN AFFAIRS

Your memorandum of February 18 raises the question, with regard to the Siouan Indians of North Carolina, whether this group can organize under the Wheeler-Howard Act to receive a constitution and charter.

Clearly, this group is not a "recognized Indian tribe now under Federal jurisdiction", within the language of section 19 of the Wheeler-Howard Act. Neither are the members of this group residents of an Indian reservation (as of June 1, 1934). These Indians, therefore, like many other Eastern groups, can participate in the benefits of the Wheeler-Howard Act only in so far as individual members may be of one-half or more Indian blood. Such members may not only participate in the educational benefits under section 11 of the Wheeler-Howard Act and in the Indian preference rights for Indian Service employment granted by section 12 of the Wheeler-Howard Act, but may also organize under Section 16 and 17 of the Wheeler-Howard Act if the Secretary of the Interior sees fit to establish for these eligible Indians a *reservation*. Such a reservation might be established either

through the outright purchase of land by the Secretary of the Interior, under section 5 of the Wheeler-Howard Act, or by the relinquishment to the United States of land purchased by the Indians themselves, under the same section of the Wheeler-Howard Act, or by a combination of these two methods of acquisition. A reservation having been established, those residing thereon will be entitled to adopt a constitution and bylaws and to receive a charter of incorporation. Under section 19 of the Wheeler-Howard Act the "Indians residing on one reservation" may be recognized as a "tribe" for the purposes of the Wheeler-Howard Act regardless of their previous status.

In order to attain these benefits some such plan as the following would, I think, be necessary: A group of landless Siouan Indians of one-half blood or more, recommended by the Siouan Council for their agricultural ability and industry, and approved by the Commissioner of Indian Affairs, would purchase a suitable tract of land and surrender title to the United States to be held in trust for the group. The land would, of course, become tax-exempt. The money needed for such purchase might be contributed in part through the generosity of several members of the Siouan Tribe and in part by the Indians who are to benefit from the project. The Indians chosen for the project would then adopt a suitable constitution and bylaws and receive a charter. The group might be designated as the "Siouan Indian Community of Lumber River." It would then participate, along with ~~adopt a suitable constitution and~~ other Indian groups, in the benefits of the Tribal Credit Fund, established under section 10 of the Wheeler-Howard Act. In the case of these Indians the fund could be used to finance

the purchase of seed and agricultural machinery and the improvement of the land. Furthermore, cooperative marketing, the establishment of a cooperative store, and possibly a cooperative dairy, might be financed by means of such credits. Such activities would make the project useful, as well as educational, to the entire Siouan Tribe.

Such a project, begun on a fairly small scale, would naturally tend to expand in membership and area if the cooperative endeavors undertaken should prove successful. Provision for the adoption of new members and the acquisition of further lands should be included in the constitution of the group.

In general, I think that some such plan as that above sketched, resting entirely on a voluntary basis and requiring no initial outlay by the United States, would prove suitable for many other nonreservation groups of Indians, and possibly for some reservation groups that are "reservation" in name only.

(Signed) FELIX S. COHEN,
Assistant Solicitor.

U.S. GOVERNMENT PRINTING OFFICE: 1977

Supreme Court, U. S.
FILED
DEC 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

DECEMBER TERM, 1977

No. 77-836

UNITED STATES OF AMERICA, *Petitioner*

v.

SMITH JOHN and HARRY SMITH JOHN, *Respondents*

On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF ACQUIESCING IN THE PETITION FOR CERTIORARI

RICHARD B. COLLINS
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Telephone: (303) 447-8760

EDWIN R. SMITH
Box 467
Philadelphia, Mississippi 39350
Telephone: (601) 656-5251

Counsel for Respondents

December 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

DECEMBER TERM, 1977

No. 77-836

UNITED STATES OF AMERICA, *Petitioner*

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On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF ACQUIESCING IN THE PETITION FOR CERTIORARI

For the reasons set out herein, respondents do not oppose the Petition for Certiorari filed by the United States on December 10, 1977.

REASONS FOR NOT OPPOSING CERTIORARI

As the Petition shows, respondents were charged with felony assault in both the federal district court and in a Mississippi State court based on the same events.

In the federal proceeding they were acquitted of felony assault but convicted of misdemeanor assault. They appealed but did not challenge the felony jurisdiction of the federal court.* However, the Court of Appeals *sua sponte* requested briefing jurisdiction pursuant to the Major Crimes Act, 18 U.S.C. § 1153. Both parties argued in favor of federal jurisdiction, but the court ruled to the contrary, and review of that decision is sought here. Respondents' federal misdemeanor sentence has now been fully served.

After the federal trial, respondents were charged with felony assault in the State courts based on the same events. They unsuccessfully opposed State court jurisdiction and were convicted of felony assault and sentenced to two years in the Mississippi State Penitentiary. That sentence has not been served, as respondents have remained free on bond pending review. They appealed to the Mississippi Supreme Court which affirmed, ruling expressly that there is no federal jurisdiction over the Mississippi Choctaw Reservation. 347 So.2d. 959 (Miss. 1977). Respondents then appealed to this Court, Jurisdictional Statement docketed October 18, 1977, as No. 77-575. In that Jurisdictional Statement, respondents contend that the federal courts have exclusive jurisdiction over the events at issue.

For these reasons, respondents do not oppose the United States' Petition for Certiorari. Because the above issue is the same in this case as in No. 77-575, the Court can obtain an opposing view on this Peti-

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* The actual grounds for respondents' appeal were not reached by the Court of Appeals, so they need not be considered by this Court. See, Petition p. 4.

tion by referring to the Motion to Dismiss filed by the State of Mississippi in No. 77-575 on December 14, 1977.

Respectfully submitted,

RICHARD B. COLLINS
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Telephone: (303) 447-8760

EDWIN R. SMITH
Box 467
Philadelphia, Mississippi 39350
Telephone: (601) 656-5251

Counsel for Respondents

December 1977

petitioner's brief

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-836

UNITED STATES OF AMERICA, PETITIONER

v.

SMITH JOHN AND HARRY SMITH JOHN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–33A) is reported at 560 F. 2d 1202. The district court did not write a formal opinion. Its order denying a Motion in Arrest of Judgment, from which the appeal was taken, is reflected in the Agreed Statement of Facts (Pet. App. C, pp. 37A–38A) entered pursuant to Rule 10(d), Fed. R. App. P. The issues on which this case was decided were raised *sua sponte* by the court of appeals and briefed at that court's request (Pet. App. D, p. 39A).

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 34A) was entered on October 11, 1977. On October 29, 1977, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including December 10, 1977. The petition was filed on that date and was granted on January 16, 1978 (A. 13A). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal district courts have criminal jurisdiction over offenses committed by Indians on land purchased and held in trust by the United States for the Mississippi Band of Choctaw Indians and declared an Indian reservation by the Secretary of the Interior.

2. Whether Congress has the power to reassert federal jurisdiction over a community of Indians after they have become subject to state jurisdiction and control.

3. Whether federal criminal jurisdiction over offenses committed by Indians on land purchased and held in trust by the United States for the Mississippi Choctaws is exclusive of state criminal jurisdiction.[1]

STATUTES INVOLVED

Sections 1151 and 1153 of Title 18, United States Code, 62 Stat. 757, 758, 63 Stat. 94; Sections 5, 7, 16

[1] This question is presented in the consolidated case, *John* v. *Mississippi*, No. 77-575.

and 19 of the Indian Reorganization Act of 1934 (the Wheeler-Howard Act), 48 Stat. 984–988, 25 U.S.C. 465, 467, 476, 479; Section 9 of the Act of May 25, 1918, 40 Stat. 573; and the Act of June 21, 1939, 53 Stat. 851, are set forth in Appendix E to the Petition at pages 40A–45A.

STATEMENT

Respondents Smith John and Harry Smith John,[2] who are Indians, were indicted in the United States District Court for the Southern District of Mississippi for assaulting Artis Jenkins with intent to kill, in violation of 18 U.S.C. 1153 and 113(a) (Pet. App. C, pp. 35A–36A).[3] The indictment stated that the incident took place "on and within the Choctaw Indian Reservation and on land within the Indian country under the jurisdiction of the United States of America" (*id.* at 36A).

At trial, the government requested instructions on assault with intent to kill and also on assault with a dangerous weapon with intent to do bodily harm, without just cause or excuse. Respondents requested an additional instruction on the lesser-included offense of simple assault as defined by 18 U.S.C. 113(e). The court gave the requested instructions and the jury convicted respondents on the charge of simple

[2] Respondent Harry Smith John died on February 18, 1978, and there is no continuing controversy with regard to his conviction.

[3] The appeal was taken on an agreed statement of facts. The statement (Pet.App. C) does not disclose whether the victim was an Indian or a non-Indian. See note 6, *infra*, p. 4.

assault, acquitting them of the other offenses.[4] Respondents were each sentenced to 90 days' imprisonment and a $300 fine.[5]

Respondents then filed a timely Motion in Arrest of Judgment, under Rule 34, Fed. R. Crim. P., asserting that the district court lacked jurisdiction over lesser-included offenses of those enumerated in 18 U.S.C. 1153.[6] The district court denied the motion and

[4] After the federal prosecution and conviction, respondents were tried and convicted in the Circuit Court of Leake County, Mississippi, for aggravated assault, in violation of Miss. Code Ann. 97-3-7 (2) (Supp. 1976), on the basis of the same incident. The Supreme Court of Mississippi affirmed their convictions on the ground that federal jurisdiction over the offense was lacking, for reasons similar to those set forth in the federal court of appeals' opinion. *John* v. *State of Mississippi*, 347 So. 2d 959 (Miss. Sup. Ct.). Respondents' appeal, No. 77-575, was consolidated with this case by the Court's order of January 16, 1978 (A. 4A, 13A). The question of jurisdiction in No. 77-575 was postponed to the hearing on the merits.

[5] These sentences were served and the fines discharged before their appeal was heard. The court of appeals determined that, under *Sibron* v. *New York*, 392 U.S. 40, 50-58, these facts did not moot the case (Pet. App. A, p. 2A). Respondents apparently have also served eight months and eleven days of the two-year sentences resulting from the State conviction, after which they were released on bond pending appeal (J.S. App., p. 3A, n. 1). ("J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 77-575.)

[6] The Major Crimes Act, 18 U.S.C. 1153, does not expressly provide for jurisdiction over lesser-included offenses. However, this Court has held that Indians prosecuted under Section 1153 are entitled to a lesser-included offense instruction. *Keeble* v. *United States*, 412 U.S. 205. If the victim was a non-Indian, jurisdiction over simple assault presumably would have been conferred directly under 18 U.S.C. 1152 (the Inter-Racial Crimes Act) and 113(e). But see H.R. Rep. No. 94-1038, 94th Cong., 2d Sess. 3 (1976); *Henry* v. *United States*, 432 F. 2d 114 (C.A. 9), modified, 434 F. 2d 1283 (C.A. 9), certiorari denied, 400 U.S. 1011.

respondents appealed. On appeal, the court of appeals, *sua sponte,* asked the Department of Justice to brief the issue whether the district court had jurisdiction "to try this case at all" under 18 U.S.C. 1153 (Pet. App. D, p. 39A),[7] asking in particular whether the alleged offenses occurred within "Indian country," as Section 1153 requires.[8] Both the United States and respondents filed briefs arguing that the district court had jurisdiction.

The court of appeals disagreed. Although noting that Congress had purchased lands in trust for the Mississippi Choctaws and that the Department of the Interior, acting pursuant to the Indian Reorganization Act, had proclaimed those trust lands "an Indian reservation" for the benefit of the Mississippi Band of Choctaw Indians (Pet. App. A., pp. 8A-20A), the court of appeals held those actions insufficient to reestablish federal jurisdiction over lands ceded by the Choctaws in the 1830 Treaty of Dancing Rabbit Creek, 7 Stat. 333. Reviewing the pertinent congressional actions, the court of appeals concluded

The jurisdictional issue on which the court of appeals decided the case, whether the offense occurred within Indian country, exists equally under 18 U.S.C. 1152 and 1153.

[7] The court of appeals' letter carries the same date as the denial by that court of the United States' petition for rehearing in *United States* v. *State Tax Commission of the State of Mississippi*, 505 F. 2d 633, rehearing denied, 535 F. 2d 300, rehearing en banc denied, 541 F. 2d 469 (C.A. 5).

[8] "Indian country," for the purposes of 18 U.S.C. 1153 (and 1152), is defined by 18 U.S.C. 1151 (Pet. App. E, p. 40A).

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that "the specific provisions of the Treaty of Dancing Rabbit Creek with reference to the Mississippi Choctaws were not amended, modified or abrogated by the within described Acts of Congress, 1918–1939," and that "while the citizens of the State of Mississippi of Choctaw Indian blood are, anthropologically, Indians they are nevertheless subject to the inherent police powers of the State anywhere within its exterior boundaries" (Pet. App. A, p. 19A). With regard to the proclamation by the Department of the Interior, the court stated that "[q]uite obviously, Congress in 1934 was legislating [the Indian Reorganization Act] for Indians in the government-guardian-ward relationship, and not for long emancipated individuals outside that relationship," and that Congress thus had "provided no authority for the Proclamation of the Assistant Secretary in 1944" (Pet. App. A, p. 20A).[9]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether the federal courts have jurisdiction over criminal offenses com-

[9] The court therefore did not consider whether Congress had the power to reestablish federal jurisdiction over Indians with respect to whom the guardian-ward relationship had once been terminated (Pet. App. A, pp. 13A–14A). Nor did the court of appeals decide whether the district court otherwise would have jurisdiction over lesser-included offenses of those enumerated in 18 U.S.C. 1153. Should this Court agree with our submission that the Mississippi Choctaw lands are Indian country within the meaning of 18 U.S.C. 1151, the Court should remand the case to the court of appeals to consider the latter issue. On remand, it may be advisable to supplement the record to show whether the victim was an Indian or non-Indian. See note 3, *supra*, p. 3

mitted on land purchased and held in trust by the United States for the Mississippi Band of Choctaw Indians. We submit that such jurisdiction is established by the relevant jurisdictional statutes, the prior decisions of this Court, and almost two centuries of Choctaw history.

1. The indictment in the present case charged respondents with assault with intent to commit murder in violation of 18 U.S.C. 1153 (the Major Crimes Act). The Major Crimes Act brings within federal jurisdiction certain enumerated crimes committed by Indians "within the Indian country," as defined by 18 U.S.C. 1151. According to that section, "Indian country" means, among other things, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government * * *," and "all dependent Indian communities within the borders of the United States whether within the original or subsequent acquired territory thereof, and whether within or without the limits of a State."

Thus, to determine whether the federal court had jurisdiction over respondents' offenses, we must determine whether the land on which the offenses occurred was "Indian country" as defined in Section 1151. For this purpose we must look in turn to the nature of the Mississippi Choctaws and of the Choctaw lands.

The history of the Choctaws in Mississippi is long and at times painful. For present purposes, it begins in the early nineteenth century when the Choctaws,

one of the Five Civilized Tribes, entered into treaties with the United States by which they ceded their lands in Mississippi to the federal government and received new lands in Oklahoma. Treaty of Exchange of Territory, 7 Stat. 210; Treaty of Dancing Rabbit Creek, 7 Stat. 333. Rather than move west, certain Choctaws chose to remain in their ancestral territory. There, they "adopted the dress, habits, customs, and manner of living of the white citizens of the State. * * * They did not live upon any reservation, nor did the [federal] Government exercise supervision or control over them" (*Winton* v. *Amos,* 255 U.S. 373, 378). Gradually, their number was depleted and their condition worsened.

By the end of the nineteenth century, the plight of the Mississippi Choctaws was decidedly unhappy. "At this time the full-blood Mississippi Choctaws were extremely poor, living in [un]sanitary conditions and working at manual labor for daily wages. Their children were not permitted to attend schools provided for the whites, and they were denied all social and political privileges. As already appears, they were receiving neither care nor attention from the Indian Office or the Department of the Interior * * *" (*Winton* v. *Amos, supra,* 255 U.S. at 379–380). Regarded by federal authorities as citizens of Mississippi, yet cut off by the State from "all social and political privileges," the Mississippi Choctaws suffered the worst of both worlds.

In 1918 the United States finally took action to bring relief to the Mississippi Choctaws. By the Act of May

25, 1918, Section 9, 40 Stat. 561, 573, Congress appropriated funds for medical assistance, schools, farm animals and equipment, and, most important, "lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians * * *." In later Acts Congress appropriated additional funds for land purchases until some 19,000 acres were acquired. *E.g.,* 41 Stat. 15 (1919); 43 Stat. 409 (1924); 44 Stat. 941 (1927); 46 Stat. 1121 (1931). At the same time Congress extended to the Mississippi Choctaws other federal benefits, which have continued to the present time.

Such legislation did not complete the United States' dealings with the Mississippi Choctaws. Pursuant to the Indian Reorganization Act of 1934, the Mississippi Band adopted a constitution and by-laws, which the Department of the Interior approved in May 1945. Congress also provided in 1939 that title to lands purchased for the Mississippi Choctaws under the 1918 Act and later Acts would be held by the United States in trust for their benefit. In December 1944, the Secretary of the Interior proclaimed these lands and lands acquired under the Indian Reorganization Act to be a reservation (Pet. App. A, pp. 23A–25A).

The lands on which respondents' acts occurred undisputedly were among the lands purchased by the United States, held in trust for the Mississippi Choctaws, and proclaimed as part of the Choctaw reservation by the Secretary of the Interior. Thus, the federal courts acquired jurisdiction over those offenses pursuant to 18 U.S.C. 1153 both because the lands were "within the limits of [an] Indian res-

ervation under the jurisdiction of the United States Government" and because the Mississippi Choctaws are a "dependent Indian communit[y] within the borders of the United States."

Although the court of appeals (without discussing the jurisdictional statutes) found no congressional intent to extend federal protection to the Mississippi Choctaws, that conclusion is belied by the course of dealing between Congress and the Mississippi Choctaws over the past sixty years. This Court has recognized in other cases that similar actions by Congress established Indian country subject to federal jurisdiction. See, *e.g., United States* v. *McGowan,* 302 U.S. 535; *United States* v. *Sandoval,* 231 U.S. 28.

The contrary conclusion would mean that federal efforts to restore the vitality of the Choctaw Tribe, and to recognize its continuing existence as a tribal entity, could be nullified by state authorities reluctant to surrender any element of state jurisdiction. The State would then be able to exercise pre-emptive authority over many aspects of tribal self-determination, depriving the federal government of its usual plenary authority to supervise and protect Indian affairs. It is not plausible that Congress, when it set out to help the Mississippi Choctaws, intended to act in so limited and ineffective a manner.

2. Congress has power to reassert federal dominion over Indians previously released from the guardian-ward relationship. The power derives from the In-

dian Commerce Clause, Article I, Section 8, clause 3, and the Treaty Making Clause, Article II, Section 2, clause 2, of the Constitution, viewed in the light of the United States' unique responsibility for the Indian people within its borders. See, *e.g., Worcester* v. *Georgia,* 6 Pet. 515; *United States* v. *Kagama,* 118 U.S. 375; *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164. "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders * * *." *United States* v. *Sandoval,* 231 U.S. 28, 45–46. This plenary power is not lost forever because Congress at one time contemplated by treaty that certain Indians could become assimilated into non-Indian society. To the contrary, Congress retains the power to alter treaty terms by subsequent legislation when it deems such alteration necessary and appropriate. *Lone Wolf* v. *Hitchcock,* 187 U.S. 553.

Moreover, Congress has the power under the Property Clause, Article IV, Section 3, clause 2, to "* * * make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Where "[t]he Government retains title to the lands which it permits the Indians to occupy [,]

[t]he Government has authority to enact regulations and protective laws respecting this territory." *United States* v. *McGowan*, 302 U.S. 535, 539. In 18 U.S.C. 1152–1153 Congress has enacted such protective laws for reservation Indians and dependent Indian communities (see 18 U.S.C. 1151). Unlike Congress' derivative legislative powers (see Article I, Section 8, clause 17), the consent of a state is not a prerequisite to the exercise of powers under the Property Clause. *Kleppe* v. *New Mexico*, 426 U.S. 529, 541–546.

We conclude, therefore, that Congress has the power to bring the Mississippi Choctaws within the scope of federal protection and that, through the Indian Reorganization Act and its other dealings with the Choctaws since 1918, Congress has done so.

3. Whether such federal jurisdiction pre-empts state criminal jurisdiction is the additional issue presented in *John* v. *Mississippi*, No. 77–575. The United States submits that the assertion of federal criminal jurisdiction over Mississippi Choctaw lands does preempt State jurisdiction over crimes involving Indians.

It is well-established that federal criminal jurisdiction within Indian country is generally exclusive of state jurisdiction. See *Williams* v. *United States*, 327 U.S. 711; *United States* v. *Chavez*, 290 U.S. 357. Although States have criminal jurisdiction over crimes involving only non-Indians, *United States* v. *McBratney*, 104 U.S. 621, "if the crime [is] by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive."[10] *Williams* v. *Lee*, 358 U.S. 217, 220. See also *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164. Neither the case law nor the relevant federal statutes, 18 U.S.C. 1151–1153, suggest any exception to this general rule for Indian country that was previously subject to state jurisdiction.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789. In determining whether States may exercise jurisdiction over Indian affairs, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, *supra*, 358 U.S. at 220. Few types of state action would infringe on the self-government and tribal existence of the Mississippi Choctaws more directly than the exercise of state criminal jurisdiction over tribal members. The federal government, both before and after passage of the Indian Reorganization Act, has taken substantial action to reestablish the Mississippi Choctaws within their ancestral territory and restore the tribe as a self-governing entity. Those efforts would be undermined if the State was allowed to subject the Choctaws to the full force of its criminal and civil laws.

[10] This Court has recently held that tribal courts lack jurisdiction where the offense is committed by a non-Indian against an Indian. *Oliphant* v. *The Suquamish Indian Tribe*, No. 76–5729, decided March 6, 1978.

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ARGUMENT

I. THE LANDS HELD BY THE UNITED STATES IN TRUST FOR THE MISSISSIPPI BAND OF CHOCTAW INDIANS AND DECLARED A RESERVATION BY THE SECRETARY OF THE INTERIOR ARE INDIAN COUNTRY WITHIN THE MEANING OF 18 U.S.C. 1151

At issue in this case is whether lands purchased and held in trust by the United States for the Mississippi Band of Choctaw Indians constitute "Indian country" within the meaning of 18 U.S.C. 1151. In concluding that they do not, the court of appeals gave too little attention to the governing jurisdictional statutes and the course of dealing between the United States and the Mississippi Choctaws over the past sixty years.

A. THE DEFINITION OF INDIAN COUNTRY

In determining the extent of federal criminal jurisdiction, one starts with the jurisdictional statutes. The indictment in this case charged that respondents, members of the Mississippi Choctaws, had committed an assault with intent to kill "on and within the Choctaw Indian Reservation and on land within the Indian country under the jurisdiction of the United States, in violation of 18 U.S.C. 1153" (the Major Crimes Act). Section 1153 confers jurisdiction on the federal district courts over certain enumerated crimes committed by Indians "within the Indian country."

The definition of Indian country is found in 18 U.S.C. 1151, the "Indian country statute." Enacted

in 1948 as a codification of existing case law,[11] Section 1151 designates three categories of land as Indian country:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

As the language and the history of this statute make clear, "Indian country" today is not limited to "original" Indian lands: lands to which Indian title has never been extinguished, or to which Indians have always claimed an aboriginal title or right of possession. While original Indian title was once a necessity under prevailing statutes (Act of June 30, 1834, 4 Stat, 729) [12] and case law (*Bates* v. *Clark*,

[11] See Reviser's Note, 18 U.S.C. 1151.

[12] Section 1 of this Act defined (4 Stat. 729) the Indian country as follows: "* * * all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished * * *."

95 U.S. 204), later cases dispensed with that requirement. Thus, in *Donnelly* v. *United States,* 228 U.S. 243, this Court held that federal jurisdiction extended to an Indian reservation created out of public lands by an Executive Order, stating that "Indian country" could no longer be confined to land to which Indian title remains unextinguished. Noting the earlier statutes and cases, the Court observed (228 U.S. at 269):

> * * * "the changes which have taken place in our situation, are so numerous and so material, that the term cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can more appropriately be deemed 'Indian country,'" within the meaning of those provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian country, than a tract of land, that, being a part of the public domain, is lawfully set apart as an Indian reservation.

The Court reaffirmed that view shortly thereafter in *United States* v. *Pelican,* 232 U.S. 442, which likewise involved a reservation created from the public domain, rather than from land previously in Indian possession. In *Pelican* the Court declared that, despite the lack of original Indian title, the land was Indian country because it had been validly set apart for the use of the Indians as such, under the superintendence of the government (232 U.S. at 449). That view is now codified in the plain language of Section 1151,

which mentions no requirement of original title.[13] Thus, if the federal government can create a reservation by Executive Order from lands within the public domain (and hence within the legislative jurisdiction of the state), as in *Donnelly* and *Pelican*, it may do so (as in this case) from purchased lands that lie within the legislative jurisdiction of the State.

Nor is the existence of a reservation a *sine qua non* of federal jurisdiction. This Court has recognized that Indian country is not limited to lands within a formally-declared reservation. In *United States* v. *McGowan,* 302 U.S. 535, the Court held that the Reno Indian Colony, "composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States and purchased out of funds appropriated by Congress in 1917 and 1926" (*id.* at 537; footnotes omitted), was "Indian country" even though the Indians involved were not a tribe but needy Indians scattered over the State of Nevada. The Court noted (*id.* at 538–539, emphasis by the Court; footnote omitted):

> Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a

[13] The Reviser's notes reveal that 18 U.S.C. Sec. 1151(a) is a codification of the term's construction by this Court in *Donnelly* and other cases. For a general discussion of the development and purpose of the definition codified in Section 1151, see Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 507–510 (1976).

settlement as a "reservation" or "colony." In the case of *United States* v. *Pelican,* 232 U.S. 442, 449, this Court said:

> "In the present case the original reservation was Indian country simply because *it had been validly set apart for the use of the Indians as such, under the superintendence of the Government.*"

That view was incorporated by the Reviser in Section 1151(b).

Since the lands at issue in this case are not "Indian allotments" (Section 1151(c)), the question is whether they are "within the limits of any Indian reservation under the jurisdiction of the United States" (Section 1151(a)), or whether the Mississippi Choctaws are a "dependent Indian communit[y]" (Section 1151(b)). For the answer we must turn to the somewhat unusual history of the Mississippi Choctaws and their relationship with the federal government, which demonstrates that both these tests are met.

B. THE MISSISSIPPI CHOCTAWS

The history of the Choctaw Tribe antedates the history of our nation. At the time of the European discovery, the Choctaws farmed a domain that covered most of the present State of Mississippi and adjoining parts of what is now Louisiana and Alabama. One of the Five Civilized Tribes, the Choctaws lived in peaceful co-existence with their non-Indian neighbors and were never reduced to a conquered status by the United States. As the non-Indian desire for land

grew, however, the Choctaws, like many other Indian tribes, were subjected to increasing pressure to leave their ancestral homelands and relocate in the westward territories.

In the early nineteenth century the Choctaw Tribe signed several treaties with the United States in which they ceded their lands in Mississippi to the federal government in exchange for specified payments and new lands in what is now Oklahoma. This process culminated in 1830 with the Treaty of Dancing Rabbit Creek, 7 Stat. 333, in which the Tribe ceded the last 10,500,000 acres of its Mississippi domain (see Pet. App. A, p. 9A). Certain members of the Tribe chose to remain in Mississippi, however, rather than leave their ancestral territory. Article 14 of the Treaty permitted them to do this and provided that those tribal members who remained in Mississippi would receive parcels of land for themselves and their families and would become citizens of the State, though they "shall not lose the privilege of a Choctaw citizen" (Pet. App. A, pp. 9A–10A and n. 4).

The unhappy story of these remaining Mississippi Choctaws is chronicled in *Winton* v. *Amos,* 255 U.S. 373. Left by themselves after the westward migration, they gradually "adopted the dress, habits, customs, and manner of living of the white citizens of the State * * *" (*id.* at 378). They did not, however, accede to the rights of state citizens as the Treaty promised, or to the benefits available to non-Indian settlers. "Their children were not permitted to at-

tend schools provided for the whites, and they were denied all social and political privileges" (*id.* at 379–380). Under the circumstances, the contemplated assimilation of the Mississippi Choctaws into non-Indian society was impossible.

At the same time, and as a consequence of the assimilationist ideal, the Mississippi Choctaws, unlike many other destitute Indians, were removed from the guardianship and protection of the federal government. "They did not live upon any reservation, nor did the Government exercise supervision or control over them" (*id.* at 378); "they were receiving neither care nor attention from the Indian Office or the Department of the Interior" (*id.* at 379–380).

In addition, representatives of the federal government denied many of these Indians the land that Article 14 of the Treaty had promised. As recounted in a 1935 Court of Claims decision,

> * * * the large number of Indians who remained in the State were subjected to a series of maladministration[s] of the article by accredited representatives of the United States that in and of itself discloses an inexcusable, cruel, and unjust procedure never excelled, if equaled, in the history of Indian affairs. Not to exceed 143 heads of families, embracing 276 individual Indians, ever received an allotment under article XIV, and at least 1,155 heads of families embracing at least 3,800 individual Indians were by intimidation, false entries, and destroyed documents cheated out of and denied their rights.

Choctaw Nation v. *United States*, 81 Ct. Cl. 1, 15–16, certiorari denied, 296 U.S. 643. Moreover, much of the land that was received by Mississippi Choctaws pursuant to the Treaty, because it was not held in trust by the United States or impressed with conditions on alienation, passed out of Indian hands.

In 1918 the federal government finally began to help the Mississippi Choctaws. By the Act of May 25, 1918, 40 Stat. 561, 573, Congress appropriated funds for medical assistance, schools, and other improvements. More important, Congress provided for the purchase of lands, "including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians." The Act made additional appropriations for needed farm animals and equipment. By succeeding Acts in every year through 1931, Congress purchased more lands for the Choctaws and extended to them additional federal benefits. See, *e.g.*, 41 Stat. 15 (1919); 43 Stat. 409 (1924); 44 Stat. 941 (1927); 46 Stat. 1121 (1931).[14]

The revitalized relations between the federal government and the Mississippi Choctaws were strengthened further after passage of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461 *et seq.* Section 18 of that Act (25 U.S.C. 478) provided that the Act would not apply "to any reservation wherein

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[14] As the court of appeals noted (Pet. App. A, pp. 5A–6A), the purchased lands were not fully contiguous and were distributed through six counties. They were, however, located at seven villages where the Choctaws were concentrated and these comprise the reservation proclaimed by the Secretary of the Interior in 1944.

a majority of the adult Indians" voted against it, and required the Secretary of the Interior to call such elections. Pursuant to this provision, on March 30, 1935, the Secretary submitted the Act to the Mississippi Choctaws, and they voted to accept it (see Pet. App. A, pp. 23a–24a). In 1939, pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, the United States acquired more than 11,000 additional acres in Mississippi in trust for the use and benefit of the Choctaw Indians of one-half or more Indian blood. Act of June 21, 1939, 53 Stat. 851.

By that same 1939 enactment, because the Choctaws had generally been unable to repay the federal government for the acquired lands (H.R. Rep. No. 194, 76th Cong., 1st Sess. (1939)). Congress also provided that title to land purchased under the appropriations of 1918–1931 would be held in trust by the United States for the Mississippi Choctaws.

The Choctaw lands were brought more completely within federal protection in December 1944. At that time the Assistant Secretary of the Interior, noting that the Mississippi Choctaws had voted in 1935 to accept the provisions of the Indian Reorganization Act and that lands had been acquired both before and after that date for the Choctaws' benefit, declared that the earlier-purchased lands were now held by the United States in trust for the Choctaws and further declared (Pet. App. A, pp. 24A–25A):

> [T]hat the approximately 11,600 acres of additional land in Mississippi, acquired since June 18, 1934, for the benefit of the Choctaw Indians of that State are hereby added to the land previously acquired and *such lands are hereby declared to be an Indian reservation* for the benefit of those members of the Mississippi Band of Choctaw Indians, of one-half or more Indian blood, resident in Mississippi and enrolled at the Choctaw Indian Agency * * * [Emphasis added.]

The Mississippi Choctaws subsequently adopted a constitution and by-laws pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. 476, and these were approved by the Secretary of the Interior on May 22, 1945.

As the court of appeals recognized (Pet. App. A, p. 21A), the dependency of the Mississippi Choctaws on the federal government continues to the present time. Congress annually appropriates funds that are administered by the United States for the Mississippi Choctaws in the same manner as for other Indian tribes. These statutes contain no indication that Congress intends the Mississippi Choctaws to enjoy a less favorable relationship with the federal government than their parent tribe or other tribes, or that the federal concern for their welfare was irretrievably curtailed by the cession treaties of the early nineteenth century.

C. THE MISSISSIPPI CHOCTAWS AS A "DEPENDENT INDIAN COMMUNITY"

The history of the Mississippi Choctaws establishes that they are a "dependent Indian communit[y]" within the meaning of 18 U.S.C. 1151(b). By purchasing land for their benefit, extending federal aid, and pursuing other actions since 1918, the federal gov-

ernment has taken decisive steps to bring these Indians back under federal protection. These measures demonstrate an intent to reestablish the guardian-ward relationship between the United States and the tribe.

The Court stated in *United States* v. *McGowan, supra,* 302 U.S. at 538, with regard to a similar Indian community: "[t]he fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people." The same "fundamental consideration" is present here. That being so, there is no legal significance in the fact that the Mississippi Choctaws had an intervening period of independence, which regrettably served only to demonstrate their need for continued protection by the United States.[13]

[13] Although the Fifth Circuit in this case also concluded that Congress in enacting the Indian country statute (18 U.S.C. 1151) could not have intended federal jurisdiction to apply to Indian trust lands interspersed with non-Indian land in "checkerboard" fashion (Pet. App. A, pp. 7A–8A), the Tenth Circuit has correctly rejected such reasoning in *United States* v. *Martine*, 442 F. 2d 1022, 1023–1024. In *Martine*, federal authorities, alleging jurisdiction under 18 U.S.C. 1153, prosecuted a Navajo Indian for an incident occurring on "the so-called checkerboard area of western New Mexico" (442 F. 2d at 1023). Describing this area as "a patchwork of land, some of which is owned by the Navajo Tribe, some of which is not, [and which] does not lie within the boundaries of any Indian Reservation (*ibid.*), the court upheld federal jurisdiction over the land (which had been "purchased with tribal funds from a corporate owner" (*ibid.*)) on the ground that its inhabitants constituted a "dependent Indian communit[y]" under 18 U.S.C. 1151(b).

Following the analysis of this Court in *United States* v. *Sandoval, supra*, which required examination of "the manner in which the pueblos had been treated by legislative and executive agencies" (442 F. 2d at 1023), the court concluded that federal actions with regard to the Navajos occupying the land in question were sufficient to make them a "dependent Indian community" and hence to confer federal jurisdiction over the Navajo portion of the checkerboard. Similar considerations are relevant here. Moreover, some Acts of Congress plainly result in checkerboard jurisdiction, and the Court has given them full effect. See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584; *DeCoteau* v. *District County Court*, 420 U.S. 425.

D. THE MISSISSIPPI CHOCTAW LANDS AS AN "INDIAN RESERVATION"

We also submit that the Mississippi Choctaw lands, at least since 1944, have constituted an "Indian reservation" within the meaning of 18 U.S.C. 1151(a). At that time, the Secretary of the Interior, acting pursuant to the Act of June 21, 1939, 53 Stat. 851, and Section 7 of the Indian Reorganization Act, 25 U.S.C. 467, expressly declared that the lands purchased and held in trust for the Mississippi Choctaws were "an Indian reservation." Unless the Secretary lacked the power to do so, such federal action established a reservation for the Choctaws and brought them within the scope of federal jurisdiction.

The court of appeals did conclude that the Secretary lacked power to establish a reservation for the Mississippi Choctaws (Pet. App. A, pp. 19A–20A). The court reasoned that the overriding purpose of the Indian Reorganization Act was to benefit "federally recognized Indian tribes" and to legislate for "Indians in the government-guardian-ward relationship," not for "long emancipated individuals outside that relationship" (Pet. App. A, pp. 19A–20A).

As indicated above, we believe that the federal gov-

ernment's actions since 1918 had reestablished a guardian-ward relationship with the Mississippi Choctaws by 1934. But the court's restricted reading is in any event inconsistent with the language and purpose of the Act, which is to be liberally construed for the Indians' benefit. *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n. 7; *Bryan* v. *Itasca County*, 426 U.S. 373, 392. See, also, *Antoine* v. *Washington*, 420 U.S. 194, 199–200. While Congress naturally emphasized increased self-government for existing tribes, there is no basis for concluding that additional tribes or reservations could not be recognized under the Act.

The provisions of the Indian Reorganization Act show an intent by the Congress to exercise its full power over Indian affairs, including its power over individual non-tribal Indians and remnants of established tribes (see p. 33, *infra*). Section 7 of the Act, 25 U.S.C. 467,[16] provides that "new Indian reservations" may be proclaimed on land acquired pursuant to, among other provisions, Section 5 of the Act (25 U.S.C. 465). Section 5, the primary authority for the purchase of lands since 1934 for the Mississippi Choctaws (see Pet. App. A, p. 24A), authorizes

[16] 25 U.S.C. 467 provides: "The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by sections 461, 462, 463, 464, 465, 466–470, 471–473, 474, 475, 476–478, and 479 of this title, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations."

the acquisition of land "for the purpose of providing land for Indians" and further declares that title to any lands acquired "shall be taken in the name of the United States in trust for the Indian tribe *or individual Indian* for which the land is acquired" (emphasis added). The term "Indian" is then defined by Section 19, 25 U.S.C. 479, to include, among others, "all other persons of one-half or more Indian blood."

By its terms, therefore, the Act is not limited to members of federally-recognized tribes but applies to certain non-tribal Indians as well. See also 78 Cong. Rec. 11732 (1934). The Court of Appeals for the District of Columbia Circuit, in *Maynor* v. *Morton*, 510 F. 2d 1254, has recognized that the Act, "[a]lthough * * * primarily designed for tribal Indians" (*id.* at 1256), applies to certain non-tribal Indians and that it authorizes the Secretary to establish new reservations for them. The court stated (*ibid.*):

> [I]t is clear from the language of the statute that some benefits of the Act were also open to any nonreservation Indian who could prove that he possessed at least one-half Indian blood. Among these benefits was the right to petition the Secretary to establish a reservation for such individuals, which, if granted, would afford them access to a wide range of federal Indian services (as a member of a recognized Indian group on a reservation). [Footnote omitted.]

The reasoning of the court of appeals in this case also conflicts with a contemporaneous interpretation

of the Indian Reorganization Act by the then Assistant Solicitor of the Department of the Interior, Felix Cohen, who was instrumental in drafting the Act.[17] Memorandum Opinion of the Assistant Solictior, U.S. Department of the Interior, April 8, 1935 (Pet. App. F). Discussing the establishment of reservations for many Eastern groups of Indians, such as the Mississippi Choctaws, the Assistant Solicitor stated:

> * * * These Indians, therefore, like many other Eastern groups, can participate in the benefits of the Wheeler-Howard Act only in so far as individual members may be of one-half or more Indian blood. Such members may * * * also organize under sections 16 and 17 of the Wheeler-Howard Act if the Secretary of the Interior sees fit to establish for these eligible Indians a *reservation*. Such a reservation might be established * * * through the outright purchase of land by the Secretary of the Interior, under Section 5 of the Wheeler-Howard Act, * * *. [Pet. App. F, pp. 46A–47A; emphasis in original.]

Furthermore, the Mississippi Choctaws were listed as one of the tribes that the Bureau of Indian Affairs surveyed during the consideration by Congress of the Indian Reorganization Act; along with 50 other tribes, they voted in favor of the bill, and this was reported to Congress. Hearings of Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 102–105 (1934). Also,

[17] Felix Cohen was one of the authors of the Act and a noted authority on Indian affairs. See *Squire* v. *Capoeman*, 351 U.S. 1, 9 n. 15; *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 159 (dissenting opinion).

as noted earlier (p. 22, *supra*), after the Act was passed the Secretary of the Interior submitted it to a vote of the Mississippi Choctaws pursuant to Section 18 of the Act.[18]

There is other evidence that Congress contemplated application of the Indian Reorganization Act for the benefit of the Mississippi Band of Choctaw Indians. The House Report recommending passage of the Act of June 21, 1939, 53 Stat. 851, which provided that title to purchased lands would be held by the United States in trust for the Mississippi Choctaw Indians, noted that passage of the Act

> will avoid many administrative problems which will arise otherwise; will insure a more productive use of the lands; and will facilitate matters greatly if the Indians should choose to organize under Section 16 of the Indian Reorganization Act, and take over administration of their lands. [H.R. Rep. No. 194, 76th Cong., 1st Sess. 3 (1939).]

Thus, Congress not only contemplated that the Indian Reorganization Act applied to the Mississippi Choctaws, but took specific action to facilitate their administration of the land involved here, pursuant to the Act.

[18] In interpreting a statute the Court "shows great deference to the interpretation given the statute by the officers or agency charged with its administration" (*Udall* v. *Tallman*, 380 U.S. 1, 16), and particularly to "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408, quoted in *Udall* v. *Tallman*, 380 U.S. 1, 16.

When the Secretary of the Interior in 1944 proclaimed the lands purchased for the Mississippi Choctaws to be an "Indian reservation," he was, therefore, acting within the scope of the Indian Reorganization Act. Assuming that Congress had the authority it exercised in that Act (a question to be discussed presently), the Secretary was establishing an "Indian reservation" for the purpose of the Indian country statute (18 U.S.C. 1151), and hence federal criminal jurisdiction under 18 U.S.C. 1153 over major crimes committed by Indians on those lands.[19]

Indeed, it makes little sense to suppose that the federal government reestablished such important ties with the Mississippi Choctaws without intending to provide them with the same federal protection against crime that was extended to most other non-assimilated Indians. Whether or not the state also has criminal jurisdiction over Indians on these lands, an issue that we address in Section III, *infra,* Congress hardly would have intended to place Choctaw lands under federal control for purposes of management and yet leave them solely within the jurisdiction of

[19] The record does not reveal respondents' relationship with the Mississippi Band, other than to show that they are Indians (Pet. App. C, p. 35A). This Court has not decided whether enrollment in an official tribe is a requirement for federal jurisdiction under 18 U.S.C. 1153. Lower courts have found such enrollment unnecessary, at least where the Indian defendant lives on the reservation and maintains tribal relations with the Indians thereon. *United States* v. *Antelope*, 430 U.S. 641, 646, 647 n. 7; see also *In re Carmen's Petition*, 165 F. Supp. 942, 946–948 (N.D. Cal.) (*dicta*), affirmed *sub nom Dickson, Warden* v. *Carmen*, 270 F. 2d 809 (C.A. 9), certiorari denied, 361 U.S. 934.

the state for other purposes. If state police protection was interrupted for some reason, or was otherwise ineffectual, Indians on these federal lands would be virtually without legal protection at the same time that they were seeking to reestablish their tribal stability. In providing relief for the Mississippi Choctaws, the federal government treated them not as other citizens of Mississippi but as special objects of federal concern, entitled to a full and necessary measure of federal protection.

We submit, therefore, that congressional and administrative actions over the past sixty years have established the lands of the Mississippi Choctaws as Indian country as defined in 18 U.S.C. 1151, both because the Mississippi Choctaws are a "dependent Indian community" and because their lands are an "Indian reservation under the jurisdiction of the United States Government." In the succeeding sections, we discuss whether the federal government had the power to take such action and whether federal jurisdiction over the Choctaw lands is exclusive of state jurisdiction.

II. CONGRESS MAY LEGISLATE FOR THE BENEFIT OF THE MISSISSIPPI CHOCTAWS UNDER ITS PLENARY POWER TO REGULATE INDIAN AFFAIRS AS WELL AS ITS POWER TO GOVERN THE USE OF FEDERAL PROPERTY

A. POWER OVER INDIAN AFFAIRS

Few propositions are more securely established than that the federal government has plenary power over Indian affairs within the United States. See

Cherokee Nation v. *Georgia,* 5 Pet. 1; *Worcester* v. *Georgia,* 6 Pet. 515; *United States* v. *Kagama,* 118 U.S. 375. While "[t]he source of federal authority over Indian matters has been the subject of some confusion, * * * it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 172 n. 7. "This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted." *Board of Commissioners* v. *Seber,* 318 U.S. 705, 715.

This Court has never given this power a confining or grudging construction; rather it has noted the special responsibilities that arise from the historical dealings between the Indians and the federal government. "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." *United States* v. *Kagama, supra,* 118 U.S. at 384–385. Moreover, the Court has recognized that "Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be

carried out." *United States* v. *McGowan, supra,* 302 U.S. at 538.

Although the federal power over Indian affairs is exercised most commonly in connection with recognized Indian tribes, it extends to individual Indians and remnants of established tribes as well. In *McClanahan* v. *Arizona State Tax Comm'n, supra,* 411 U.S. at 179–180, this Court struck down a state income tax on individual Indians, saying: "Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." Similarly, this Court has acknowledged "[t]he obligation and the power of the United States to protect and preserve * * * restricted allotted lands for the Indian owners * * *." *Board of Commissioners* v. *Seber, supra,* 318 U.S. at 717; *Heckman* v. *United States,* 224 U.S. 413. As we have previously discussed (pp. 23–24, *supra*), the Federal Government also "exercis[es] a fostering care and protection of all dependent Indian communities within its borders" (*United States* v. *Sandoval, supra,* 231 U.S. at 46), and "it is immaterial whether Congress designates a settlement as a 'reservation' or 'colony' " (*United States* v. *McGowan, supra,* 302 U.S. at 538–539).

While Congress may not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe" (*United States* v. *Sandoval, supra,* 231 U.S. at 46), it is clear

that "in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts" (*ibid.*). The Mississippi Choctaws, a band of some 2,000–4,000 Indians, the remnants of one tribe, who live in general proximity to one another in adjoining counties within a State, are a "distinctly Indian communit[y]." As such, they are appropriate subjects for legislation by Congress in the exercise of its plenary power over Indian affairs.

The power of Congress to assert jurisdiction over the Mississippi Choctaws was not irrevocably divested in 1830 by the Treaty of Dancing Rabbit Creek. Although the Choctaws ceded lands in Mississippi to the United States, Article XIV of the Treaty (7 Stat. 333, 335) contemplated that certain full-blood Choctaws, "being desirous to remain and become * * * citizen[s] of the States," would stay in Mississippi and be entitled to grants of land. The Treaty further provided that "[p]ersons who claim under this article shall not lose the privilege of a Choctaw citizen * * *." Nothing in the Treaty provided that the federal government would not later bring the Mississippi Choctaws within the ambit of federal protection, expend funds for their care, provide tribal land for them, or reestablish a reservation for them.

Even if the Treaty had contained an express provision limiting the relationship between the federal government and the Mississippi Choctaws, that provision would not be a perpetual bar to reestablishment of federal supervision. It is well-established that Congress, having the power to enter into treaties with the Indians, has the corresponding power to modify or act inconsistently with treaty provisions when it deems it necessary to do so. *Menominee Tribe* v. *United States,* 391 U.S. 404, 412–413; *Ex parte Webb,* 225 U.S. 663, 683; *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565–566. Here, where Congress is acting for the Indians' benefit and no party to the Treaty objects to such action, it is not a proper judicial function to hold Congress to enforcement of a hard bargain or to sever Congress's authority to provide relief. If Congress, once having granted certain Indians their independence, were disabled from reestablishing the guardian-ward relationship in response to subsequent conditions, the freedom of the federal government to experiment with different proposals for the Indians' welfare would be needlessly limited.

It is similarly irrelevant to the extent of Congress's power over particular Indians that they have become citizens of a State. In *Winton* v. *Amos, supra,* this Court upheld a jurisdictional statute providing for "a suit of an equitable nature against [a] class of Mississippi Choctaws" (255 U.S. at 391), stating (*id.* at 392): "The [federal] guardianship arises from [the Indians'] condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it" (citations

omitted). That decision, upholding Congress's powers over the Mississippi Choctaws more than seventy years after the Treaty of Dancing Rabbit Creek, confirms the enduring nature of the United States' authority over its Indian peoples, regardless of any prior intention to commit them to the exclusive protection of the states. See *McClanahan* v. *Arizona State Tax Comm'n, supra; Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463.

It may be that at some point certain Indians can become so indistinguishable from their non-Indian neighbors, and their Indian origins so attenuated, that the federal government cannot rationally single them out for special treatment. See *Morton* v. *Ruiz*, 415 U.S. 199. But that possibility need not concern us here. The Mississippi Choctaws never achieved integration into non-Indian society. Indeed, no one has questioned the authority of Congress to purchase lands and provide benefits to relieve their suffering. Once that power is conceded, it seems unavoidable that Congress had the additional power to place the lands in trust status, authorize their designation as a reservation, and extend to them and the Indians living on them the protection of the federal criminal laws. That, we submit, is what Congress has done.

B. THE PROPERTY CLAUSE

Having acquired title to the Mississippi Choctaws' lands, Congress also was empowered to assert criminal jurisdiction over those lands pursuant to the Property Clause of the Constitution (Article IV, Section 3,

clause 2), which authorizes Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *."

This Court has long recognized that the Property Clause gives Congress legislative power over Indians on government lands. In *United States* v. *Celestine*, 215 U.S. 278, the Court stated that "[f]rom an early time in the history of the Government [Congress] has exercised this power, and has also been legislating concerning Indians occupying such territory" (*id.* at 284), citing as an example the Act of June 30, 1834, 4 Stat. 729, defining "Indian country." Subsequently, in *United States* v. *McGowan, supra*, 302 at 539, the Court noted that "[t]he Government retains title to the lands which it permits the Indians to occupy * * * [and] has authority to enact regulations and protective laws respecting this territory," citing the Property Clause. Sections 1152 and 1153 of Title 18 are examples of "protective laws" for the Indians' benefit applicable in lands owned by the United States.

This Court has recently reaffirmed the broad scope of Congress' powers under the Property Clause. In *Kleppe* v. *New Mexico*, 426 U.S. 529, the Court declared that Congress itself has the power to determine what are necessary rules respecting the public lands, and analogized this power to the police power of the States.[20]

[20] "[T]he Clause, in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands.

Nor is state consent a prerequisite to the exercise of Congress's power under the Property Clause or its power over Indian affairs. Although Congress may acquire derivative legislative power from a state pursuant to Article I, Section 8, clause 17 of the Constitution (the Arsenals and Dockyards Clause), see *Paul* v. *United States*, 371 U.S. 245, the powers asserted here are not derived from that clause but are independent and unrelated. As this Court stated in *Kleppe* v. *New Mexico, supra*, with regard to the Property Clause (426 U.S. at 543): "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause * * *. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause" (citations omitted).

These principles apply fully to the exercise of Congress' powers over lands held for the Indians' benefit; otherwise, essential federal programs might well be put "completely at the mercy of state legislation"

United States v. *San Francisco*, 310 U.S. at 29–30; *Light* v. *United States*, 220 U.S. at 537; *United States* v. *Gratiot*, 14 Pet. at 537–538. And while the furthest reaches of the power granted by the Property Clause have not yet been definitely resolved, we have repeatedly observed that '[t]he power over the public lands thus entrusted to Congress is without limitations.' * * * And even over public land within the States, '[t]he general Government doubtless has a power over its own property analogous to the police power of the several States and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case" (426 U.S. at 539).

(*Kleppe* v. *New Mexico, supra*, 426 U.S. at 543). Accordingly, Congress had the power to declare the Mississippi Choctaw lands "Indian country" and assert federal criminal jurisdiction over them.

III. FEDERAL CRIMINAL JURISDICTION ON MISSISSIPPI CHOCTAW LANDS IS EXCLUSIVE OF STATE JURISDICTION OVER CRIMES INVOLVING INDIANS

For the reasons previously stated, we submit that the federal government has validly asserted criminal jurisdiction over lands held in trust for the Mississippi Choctaws. The remaining question, presented in *John* v. *Mississippi*, No. 77–575, is whether that jurisdiction is exclusive of state jurisdiction with respect to crimes involving Indians. We believe that it is.

We begin with certain established principles. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789. In *Worcester* v. *Georgia*, 6 Pet. 515, this Court made it clear that the lands of the Cherokee nation were territory "in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and [the Cherokee] nation is, by our constitution and laws, vested in the government of the United States" (*id.* at 560).

Although "the trend has been away from the idea of inherent tribal sovereignty as a bar to state juris-

diction and toward reliance on federal pre-emption" (*McClanahan* v. *Arizona State Tax Comm'n, supra,* 411 U.S. at 172), the effects on state jurisdiction have not changed significantly. The States may exercise criminal jurisdiction over crimes in Indian country not involving Indians (*United States* v. *McBratney,* 104 U.S. 621; *New York ex rel Ray* v. *Martin,* 326 U.S. 496); "[b]ut if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *Williams* v. *Lee,* 358 U.S. 217, 220; *Williams* v. *United States,* 327 U.S. 711, 714 and n. 10; *McClanahan* v. *Arizona State Tax Comm'n, supra,* 411 U.S. at 171–172. Indeed, this Court has noted that "Congress has * * * acted consistently upon the assumption that the states have no power to regulate the affairs of Indians on a reservation." *Williams* v. *Lee, supra,* 358 U.S. at 220.

The assertion of federal jurisdiction over the Choctaw lands under 18 U.S.C. 1152–1153, therefore, would prevent the State of Mississippi from asserting concurrent jurisdiction over offenses on those lands involving Indians, unless the particular history and circumstances of the Mississippi Choctaws required a different result.[21] The Supreme Court of Mississippi

[21] To the extent that the assertion of federal jurisdiction rests on powers derived from the Property Clause, rather than Congress's plenary powers over Indian affairs, we reach the same conclusion. In choosing to manage its lands for the Choctaws' benefit, Congress has left little room for state interference through application of state criminal laws. As we discuss in the text, if the State can enter those lands at will and subject their occupants to arrest and imprisonment on state charges, such action will threaten the self-government of the Choctaws and conflict with the evident purpose of Congress in administering those lands. Thus, under the Supremacy Clause, state criminal jurisdiction must be held to be pre-empted. See p. 38, *supra.*

(J.S. App., p. 5a) appears to offer two coordinated rationales for upholding state jurisdiction over the Choctaw lands: (1) that Congress did not intend the federal courts to have jurisdiction over the Mississippi Choctaws, and (2) that in any event the state courts, once having had jurisdiction over the Choctaws, have not lost it. Our disagreement with the first proposition has already been discussed (pp. 14–31, *supra*); the second proposition merits further attention.

At first blush, there is some appeal to the notion that state courts, although historically disabled from claiming jurisdiction over Indians, may nonetheless retain any jurisdiction that they once acquired. In 1830 the federal government contemplated the general integration of the Mississippi Choctaws into non-Indian society, and state jurisdiction over the Choctaws presumably was accepted as a natural incident of that integration. But the Mississippi Choctaws did not become completely integrated with their non-Indian neighbors after the Treaty of Dancing Rabbit Creek; almost one hundred years later, this Court observed that the Choctaws had been "denied all social and political privileges." *Winton* v. *Amos, supra,* 255 U.S. at 379. It was precisely because the expected assimilation had failed, and the Indians had fallen into destitution, that the federal government

resumed its relations within the Mississippi Choctaws in the early part of this century.

Moreover, "[t]he overriding purpose of [the Indian Reorganization Act of 1934] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically" (*Morton* v. *Mancari*, 417 U.S. 535, 542). Pursuant to that Act, the Secretary of the Interior acquired additional lands for the Mississippi Choctaws, proclaimed all their trust lands to be a reservation, and approved a tribal constitution and by-laws (see pp. 21–23, *supra*). In these circumstances, assertion of state criminal jurisdiction over crimes involving Indians on the Choctaw lands would "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, *supra*, 358 U.S. at 220. If state jurisdiction over the Mississippi Choctaws on their own lands were authorized, the thrust of federal policy, with its objective of renewed tribal identity and self-determination, would be thwarted. State criminal jurisdiction must therefore be pre-empted.

This Court has reached a similar conclusion in *Fisher* v. *District Court*, 424 U.S. 382, a case concerning assertion of state jurisdiction over adoption proceedings involving members of the Cheyenne Tribe. Having concluded that the Tribal Court had exclusive jurisdiction over the proceedings (*id.* at 388), the Court rejected the State's argument that its

prior jurisdiction over tribal adoptions could not be displaced. The Court stated (*id.* at 390):

> The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by § 16 of the Indian Reorganization Act, 25 U.S.C. § 476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, even if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe * * *, that jurisdiction has now been pre-empted.

There is no reason to reach a different result here. The federal government is not asserting jurisdiction over any lands owned by non-Indians but solely over lands held by the United States for the Choctaw Indians themselves. Compare *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584. When Indians go off those tribal lands, they are subject to state jurisdiction as they always have been. Moreover, the State has jurisdiction even within the tribal trust lands over offenses that do not involve Indians, *United States* v. *McBratney*, *supra*.[22] Should the State wish to exercise full criminal

[22] The Fourth Circuit has suggested in dictum that the State of North Carolina and United States have "concurrent" jurisdiction over lands held by the United States for the Eastern Band of Cherokee Indians. *United States* v. *Hornbuckle*, 422 F. 2d 391. To the extent that this language means only that the State may exercise jurisdiction where federal and tribal jurisdiction are not exclusive, we believe that the views in *Hornbuckle* may be reconciled with the position that we advance here. If the Fourth Circuit

jurisdiction over the Mississippi Choctaw lands, it may acquire such jurisdiction (with the Tribe's consent) under Title IV of the Civil Rights Act of 1968, 82 Stat. 78, 25 U.S.C. 1321 *et seq.* Thus, the State has ample means by which to assure its sovereign interests and the interests of its non-Indian citizens.[23]

We recognize that the federal government has not continuously asserted criminal jurisdiction over the Mississippi Choctaw lands since 1918 or even since 1945.[24] But the federal government should no more be disqualified by that omission from now affording protection to the Mississippi Choctaws, than it should be prevented from reestablishing a guardian-ward relationship with them because it once improvidently foresaw their integration into non-Indian society after the Treaty of Dancing Rabbit Creek. The symmetry between Indian history and Indian law is not always perfect. But where Congress, even belatedly, has sufficiently expressed its intent to exercise its plenary power over identifiable Indians, and to bring them within the ambit of federal concern, that intent should be given effect.

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means, however, that the State has jurisdiction over crimes committed by or against Indians on those lands, we believe that suggestion to be incorrect. In any event, we note that the history of the Eastern Band of Cherokees is in some respects quite different from the history of the Mississippi Choctaws. See *United States* v. *Wright*, 53 F. 2d 300 (C.A. 4).

[23] As a practical matter, it is our understanding that recognition of exclusive federal jurisdiction would affect few, if any, current state prisoners besides appellant.

[24] The federal government began asserting criminal jurisdiction over the Choctaw Reservation (when Indians were involved) during the late 1960s, and such jurisdiction has continued to the present time. The recent decisions of the Fifth Circuit and the Mississippi Supreme Court, however, have encouraged state authorities to exercise a greater degree of control over reservation activities and imperiled the effectiveness of federal law enforcement on Choctaw lands.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals and the Supreme Court of Mississippi should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
JAMES W. MOORMAN,
Assistant Attorney General.
H. BARTOW FARR III,
Assistant to the Solicitor General.
RAYMOND N. ZAGONE,
CARL STRASS,
LARRY G. GUTTERRIDGE,
Attorneys.

MARCH 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978

Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-836

UNITED STATES OF AMERICA,

Petitioner,

v.

SMITH JOHN and HARRY SMITH JOHN,

Respondents.

BRIEF *AMICUS CURIAE* OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

ARTHUR LAZARUS, JR.

600 New Hampshire Ave., N.W.
Washington, D.C. 20037

Attorney for Amicus Curiae.

Of Counsel:

S. BOBO DEAN
LEROY W. WILDER

Washington, D.C. • THIEL PRESS • (202) 638-4521

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-836

UNITED STATES OF AMERICA,

Petitioner,

v.

SMITH JOHN and HARRY SMITH JOHN,

Respondents.

BRIEF *AMICUS CURIAE* OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

Pursuant to Rule 42(2), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York, 10016, files the attached brief *amicus curiae* in support of Petitioner in the above-captioned case. The petitioner, the United States of America, and the respondents, Smith John and Harry Smith John, have consented to the filing of this brief *amicus curiae*.

INTEREST OF *AMICUS CURIAE*

The Association on American Indian Affairs, Inc. is a non-profit membership corporation organized under the laws of the state of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nation-wide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *Oliphant v. Suquamish Indian Tribe*, No. 76-5729 (opinion pending), *Rosebud Sioux Tribe v. Kneip*, ___ U.S. ___, 51 L.Ed. 2d 660 (1977), *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), and *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965).

This case presents a question of concern to the Association and to Indians generally throughout the United States—whether the Congress and the Executive Branch legally can establish an Indian reservation which is subject to federal laws applicable to Indians in the "Indian Country" on lands previously subject to state jurisdiction. The United States Court of Appeals for the Fifth Circuit has held that the Mississippi Band of Choctaw Indians is not an Indian tribe and its members are subject to the inherent police power of the state of Mississippi notwithstanding the fact that they occupy an Indian reservation established by the Secretary of the Interior pursuant to explicit statutory authority. This decision is in direct

conflict with prior decisions of this Court as to the plenary authority of the Congress to legislate with respect to Indian affairs. *See, e.g., United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Kagama*, 118 U.S. 375 (1886). Other tribes occupying reservations which have been established pursuant to the same statutory authority would be adversely affected if the decision below is upheld in that they, too, might be held subject to state jurisdiction and have their tribal existence questioned.

STATEMENT OF THE CASE

The ancestral homeland of the Choctaw Indian Tribe originally included much of what is now the state of Mississippi. Prior to 1830 the Tribe ceded portions of its territory to the United States through a series of treaties[1] in which its tribal existence and its ownership of its remaining lands were recognized by the United States. This process culminated on September 27, 1830 in the Treaty of Dancing Rabbit Creek, by which the Choctaw tribe ceded the last of its land to the United States. This treaty gave individual tribal members the choice of moving to the Indian Territory or remaining in the state of Mississippi to become citizens. Subsequently, the majority of Choctaws moved west to the Indian Territory. Many remained, however, and about 2,000 Choctaws still resided in Mississippi in 1900.

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[1] Treaty of December 17, 1801, 7 Stat. 66; Treaty of October 17, 1802, 7 Stat. 73; Treaty of August 31, 1803, 7 Stat. 80; Treaty of November 16, 1805, 7 Stat. 98; Treaty of October 24, 1816, 7 Stat. 152; Treaty of October 18, 1820, 7 Stat. 210; Treaty of January 20, 1825, 7 Stat. 234; Treaty of September 27, 1830, 7 Stat. 333.

In 1917 an intensive investigation by a committee of the United States House of Representatives revealed that the Mississippi Choctaws lacked adequate housing, health, food, clothing and educational benefits.[2] Congress subsequently passed the Act of May 25, 1918, 40 Stat. 573, which appropriated $75,000 for the Mississippi Choctaws for improving health, education and housing through credit, land purchase and economic development programs. In 1921 Congress expanded the land purchase program, and from 1921 until 1932 the federal government purchased 3,680 acres of land for the Mississippi Choctaws. *See* Act of February 14, 1931, 46 Stat. 1121.

In 1934 Congress passed the Act of June 18, 1934, 48 Stat. 984 (hereinafter cited as the "Wheeler-Howard Act"), which provided, *inter alia*, that title to land purchased for Indians could be taken in trust by the United States for the Indians' benefit, and reservations created therefrom. 25 U.S.C. §§465, 467. The Act provided that Indians occupying these reservations could form tribal governments. 25 U.S.C. §476. It also defined the term "Indian tribe" to include "the Indians residing on one reservation." 25 U.S.C. §479.

Pursuant to the Act of June 21, 1939, 53 Stat. 851, Congress specifically placed title to the lands previously purchased for individual Choctaw Indians in Mississippi in trust for the benefit of all Choctaw Indians in Mississippi of one-half or more degree of Indian blood. On December 4, 1944, the Assistant Secretary of the Interior issued a proclamation under the authority of 25 U.S.C. §467 which declared such lands to be an Indian reservation.

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[2] Hearings before the Committee on the Investigation of the Indian Service, House of Representatives, 65th Cong. 1st Sess. March 6, 1917.

In *United States v. State Tax Commission of the State of Mississippi*, 505 F.2d 633 (5th Cir. 1974) reh. denied, 535 F.2d 300 (1976), reh. *en banc* denied, 541 F.2d 469 (1976), and in the instant case, the Fifth Circuit Court of Appeals has held that the actions of Congress and the Secretary of the Interior in creating the reservation for the Mississippi Choctaws did not impair state jurisdiction over the Choctaws within the reservation. In this case the court held that the reservation created for the Mississippi Choctaws is not "Indian Country" as defined in 18 U.S.C. §1151, and that consequently the federal laws applicable to Indians in the "Indian Country" do not extend to it.[3]

SUMMARY OF ARGUMENT

The Court of Appeals has concluded that Choctaw relinquishment of tribal lands in Mississippi pursuant to the 1830 Treaty of Dancing Rabbit Creek deprived the Congress of its plenary authority to legislate with reference to the Choctaws who remained in Mississippi.

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[3] 18 U.S.C. §1151. Indian Country defined.

> Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c.645, 62 Stat. 757; May 24, 1949, c.139, §25, 63 Stat. 94.

This conclusion directly is in conflict with all of the decisions of this Court which assert the power of Congress to legislate with respect to Indians whether they are on or off reservation lands. *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876).

In the Wheeler-Howard Act Congress authorized the creation of new Indian reservations for landless Indians and granted to tribes occupying such reservations the right to form tribal governments. Through the implementation of these statutory provisions the Mississippi Band of Choctaw Indians now constitute an Indian tribe occupying an Indian reservation, and their reservation is "Indian Country" as defined by 18 U.S.C. §1151.

ARGUMENT

I.

THE PLENARY FEDERAL POWER IN INDIAN AFFAIRS EXTENDS TO ALL INDIANS AND IS NOT DEPENDENT ON RESIDENCE OR ON LACK OF CITIZENSHIP.

A. Congress has plenary authority over Indians.

The Congress has plenary authority to legislate with respect to Indians and Indian affairs. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *United States v. Kagama*, 118 U.S. 375 (1886); *Worcester v. Georgia*, 31 U.S. 515 (1832). *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 89-115 (1942).[4] This Court has recognized that the Congress has a special responsibility to provide for the protection and welfare of

[4] In deciding Indian cases, Felix S. Cohen frequently has been relied upon by this Court, and, indeed, in Squire v. Capoeman, 351 U.S. 1, 9 (1956), was referred to as "an acknowledged expert in Indian law. . . . "

the Indian tribes, and has the Constitutional power to discharge that responsibility. It has also concluded that Congressional authority extends to Indians located outside of Indian reservations. *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *United States v. Kagama*, 118 U.S. 375 (1886).[5] Felix S. Cohen summarized the federal relationship with Indians as follows:

> It is clear that the powers mentioned by Chief Justice Marshall proved to be so extensive that in fact the Federal Government's powers over Indian affairs are as wide as state powers over non-Indians, and therefore one is practically justified in characterizing such federal power as "plenary". [F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 91 (1942).]

B. The Treaty of Dancing Rabbit Creek did not terminate Congress' power over the Mississippi Choctaws.

The Court of Appeals for the Fifth Circuit has held that, by signing the Treaty of Dancing Rabbit Creek, Congress has relinquished its obligation to and power over the Mississippi Band of Choctaw Indians. That court relied, in part, on Article III of the Treaty in which the

[5] This Court in the *Kagama* case stated:

> These Indian tribes are the *wards* of the Nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. [Original emphasis] [118 U.S. at 384].

Choctaw Tribe ceded the remainder of its land to the United States.[6] The court also placed great emphasis on Article XIV of the Treaty which granted the option to each Choctaw head of family to move to the Indian Country or remain in Mississippi and eventually become a citizen of the United States.[7] No other provisions of the Treaty, however, were cited or relied upon by the court. Thus, the lower court relied exclusively on the Tribe's relinquishment of its lands in Mississippi and the treaty provision authorizing Choctaws to remain and become citizens to support its conclusion that the plenary federal authority over the Choctaws in Mississippi has been terminated. However, neither of these treaty provisions, either separately or in concert, terminated the authority of the Congress to legislate with reference to

[6] The Court relied on the following language of Article III:

> [T]he Choctaw Nation of Indians consent and hereby cede to the United States, the entire country they own and possess, east of the Mississippi River; and they agree to move beyond the Mississippi River, early as practicable. . . . ."

[7] "Article XIV: Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this Treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity."

Mississippi Choctaw affairs under the principles laid down by prior decisions of this Court.

1. The grant of citizenship to Indians does not impair plenary federal authority as to their affairs.

In *Cramer v. United States*, 261 U.S. 219 (1923), this Court held that the Federal Government's "duty of protection and power extend to individual Indians, even though they may have become citizens." *Id.* at 232. *Accord, United States v. Nice*, 241 U.S. 591, 598 (1916); *Heckman v. United States*, 224 U.S. 413 (1912); *United States v. Gray*, 201 Fed. 291 (8th Cir. 1912)

In *Cramer* the Court quoted from the *Gray* case, as follows:

> The civil and political status of the Indians does not condition the power of the government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power nor relieve it of its duty . . . . [*Cramer v. United States*, 261 U.S. at 232.]

Indeed, this very principle has been applied to the Choctaws in Mississippi in a case relied on by the court below. In *Winton v. Amos*, 255 U.S. 373 (1921)[8] this

[8] The Court below relied on the factual findings of the Supreme Court in the *Winton* case – that the Choctaws who remained in Mississippi after the relinquishment of tribal lands did not reside on an Indian reservation and were subject to State laws. From these facts the Court below erroneously concluded that the United States by the treaty gave up its preemptive jurisdiction over the Choctaws in Mississippi and their affairs. The *Winton* case in fact affirms the continuous authority of Congress to legislate with respect to the Mississippi Choctaws. Indeed, Article XIV of the Treaty itself, expressly sanctions the continuing tribal relationship of the Mississippi Choctaws by providing: "Persons who claim under this article shall not lose the privilege of a Choctaw citizen. . . ."

Court upheld a Congressional action which allowed individual full-blood Mississippi Choctaws to be sued as a group. The Court, by so holding, specifically recognized that the federal authority over the full-blood Mississippi Choctaws had not been terminated by the Treaty of Dancing Rabbit Creek. "[I]t rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it." *Id.* at 392.

2. The absence of a reservation does not preclude Congressional authority.

This Court has ruled that Indians who do not reside on reservations are still subject to the plenary authority of the Federal Government in Indian matters. *Morton v. Ruiz*, 415 U.S. 199, 212 (1974); *United States v. 43 Gallons of Whiskey*, 93 U.S. 193 (1876). *See also Rosebud Sioux TRibe v. Kneip*, ___ U.S. ___ 51 L.Ed. 2d 660 at 682 n.48 (1977); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 538 F.2d 370 (1st Cir. 1975). Indeed, as the Court in *Ruiz* correctly observed, nearly all Indians living in the states of Alaska and Oklahoma would be denied federal services, which they now receive, if reservation status were a prerequisite for the exercise of federal authority over Indians. *Morton v. Ruiz*, 415 U.S. 199, 212 (1974).[9]

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[9]The specific statute at issue in the *Ruiz* case was the so-called Snyder Act, 42 Stat. 208, 25 U.S.C. §13. It reads in part as follows:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such monies as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians *throughout the United States* .... [Emphasis supplied].

[footnote continued]

In the *Winton* case, this Court held that Congress retained its authority over the Choctaw Indians residing in Mississippi, thus enabling the Congress to authorize a suit against them as a group. The fact that the Mississippi Choctaws did not reside on a reservation was not even considered by the Supreme Court when it decided that Congress had authority to legislate with respect to their affairs after the relinquishment of tribal lands in the Treaty of Dancing Rabbit Creek. *Winton v. Amos*, 255 U.S. 373 (1921).

The conclusion of the court below that the United States through the Treaty of Dancing Rabbit Creek terminated the guardian-ward relationship between the Federal Government and the Choctaws in Mississippi is wholly inconsistent with the decisions of this Court, including the *Winton* decision.[10] Moreover, even if the Treaty did terminate the relationship, as the following discussion will show, Congress has the authority to reestablish it.

The Court specifically limited its ruling to the facts before it – whether the benefits of the Bureau of Indian Affairs' general assistance program must be provided to Indians living near a reservation. The opinion, however, implicitly concedes that the Snyder Act was a grant of authority to the Bureau that Congress had the power to make.

[10] Indeed, if the Treaty of Dancing Rabbit Creek had the effect accorded it by the Court of Appeals – that the federal relationship with the Mississippi Choctaws, in fact, completely was terminated– then Congress had no authority to act as it did between 1918 and the present for their benefit. As this Court has observed, Congress Constitutionally may legislate special treatment for Indians "only as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ." Morton v. Mancari, 417 U.S. 535, 555 (1974).

II.

CONGRESS MAY LEGISLATE FOR THE PROTECTION OF INDIANS ANYWHERE IN THE UNITED STATES AND MAY ESTABLISH RESERVATIONS FOR THEIR BENEFIT WHICH CONSTITUTE "INDIAN COUNTRY"

A. Congress may establish Indian reservations for landless Indians which constitute "Indian Country."

As this Court stated in *United States v. Sandoval*, 231 U.S. 28 (1913), "the question whether, to what extent, and for what time they [Indian tribes] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by the Congress, and not by the courts." *Id.* at 45, 46. *Cf. United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Ramsey*, 271 U.S. 467 (1926).

Furthermore, under the authority of the special federal relationship, Congress has power to establish Indian reservations under exclusive federal jurisdiction for landless Indian groups. In *United States v. McGowan*, 302 U.S. 535 (1938), this Court held that land purchased for a group of Indians called the Reno Indian Colony,[11] title to which was held by the United States in trust for the group, was "Indian Country." The Court noted that, with respect to the land set apart for the Colony, "the

[11] The Court in the *McGowan* case noted: "The Reno Indian Colony is composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States and purchased out of funds appropriated by Congress in 1916 and 1926. The purpose of Congress in creating this colony was to provide lands for needy Indians scattered over the State of Nevada, and to equip and supervise these Indians in establishing a permanent settlement." 302 U.S. at 537.

government has authority to enact regulations and protective laws respecting this territory" *Id.* at 539. and quoted its opinion in *United States v. Ramsey*, 271 U.S. 467 (1926) as follows:

> Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States. [*United States v. McGowan*, 302 U.S. 535, 539 (1937)]

The Court's observations regarding the authority which Congress maintains over land set aside for Indians, regardless of the manner in which the land was acquired, are worth noting:

> The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as "reservations." Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a "reservation" or a "Colony." [*Id.* at 538, 539.]

Thus, this Court has recognized that Congress has the authority to establish Indian reservations for specific groups of Indians and to extend exclusive federal jurisdiction over them.

B. The Wheeler-Howard Act authorized the establishment of reservations and the organization of tribal governments for Indians of one-half or more degree Indian blood who lacked reservations and tribal organizations as of the date of the Act.

The decision below relied on a determination that the Wheeler-Howard Act did not apply to the Mississippi Choctaws. Consequently, so the argument runs, the creation of a reservation for the Choctaws pursuant to authority conferred on the Secretary of the Interior by that Act did not reestablish federal criminal jurisdiction over Choctaws on the reservation.

This conclusion is in direct conflict with the plain language of the Wheeler-Howard Act, as well as with evidence of the Congressional intent contained in its legislative history. From the original drafting of the bill under the auspices of the Executive Branch, one of its principal purposes was to provide for reservations and other benefits "for those Indians who have been rendered landless by the government's own acts." *Hearings on H.R. 7902 before the House Committee on Indian Affairs*, 73d Cong., 2d Sess. 20 (1934).

The provisions of the bill which were intended to carry out this purpose remained virtually intact in the final legislation. The Secretary of the Interior was expressly authorized by section 5 of the Act to acquire lands ". . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. §465. He was authorized ". . . to proclaim Indian reservations on lands acquired pursuant to any authority conferred . . ." by other sections of the Act, including section 5. 25 U.S.C. §467.

Finally, he was authorized by section 16 to call a tribal election for the adoption of a constitution and bylaws by

any Indian tribe or tribes "residing on the same reservation . . . ." 25 U.S.C. §476. These provisions of the Act authorize specific actions to be taken by the Secretary of the Interior for the benefit of "Indians" who are defined in the Act, as follows:

> . . . all persons of Indian descent who are members of any recognized Indian tribe now under Federal jursidiction and all persons who are descendents of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include *all other persons of one-half or more Indian blood* . . . . [25 U.S.C. §479.] [Emphasis supplied].

Furthermore, section 19 defines the term "Indian tribe" for purposes of the Act as including ". . . the Indians residing on one reservation." 25 U.S.C. §479.

Thus, Congress made crystal clear its intention to extend to Indians and Indian tribes, *as defined in section 19*, benefits of the Act, including the purchase of land, the proclamation of reservations and the establishment of tribal governments.[12] In concluding that

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[12] On August 31, 1936 the Solicitor of the Department of the Interior issued an opinion that the benefits of the Indian Reorganization Act are available under Section 19 to "persons of one-half or more Indian blood regardless of membership in a recognized Indian tribe under Federal jurisdiction and regardless of residence on an Indian reservation." Memorandum Opinion, dated August 31, 1936, of the Solicitor, U.S. Department of the Interior.

Moreover, the question of whether Indians of one-half degree or more Indian ancestry, who were not members of a recognized tribe or descendants thereof residing on reservations, could fall within the Secretary's power to authorize the establishment of constitutional tribal governments had already been answered in a Memorandum Opinion dated April 8, 1935 by Felix S. Cohen, who was then Assistant Solicitor and who later became the acknowledged authority on Federal Indian Law. After granting

[footnote continued]

Congress was not legislating with respect to the Mississippi Choctaws when it passed the Wheeler-Howard Act, the court below completely disregarded this clear Congressional expression of the scope of the Act.

The legislative history of the Wheeler-Howard Act provides additional support for this conclusion. For example, the House Interior Committee states in its report on the bill: "To make many of the now pauperized, landless Indians self-supporting, it [the bill] authorizes a long-term program of purchasing land for them . . ." H.R. REP . NO. 1804, 73d Cong. 2d Sess. 2

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that an Indian group in North Carolina was not a recognized tribe, Cohen proceeded:

> These Indians, therefore, like many other Eastern groups, can participate in the benefits of the Wheeler-Howard Act only in so far as individual members may be of one-half or more Indian blood. Such members may not only participate in the educational benefits under section 11 of the Wheeler-Howard Act and in the Indian preference rights for Indian Service employment granted by section 12 of the Wheeler-Howard Act, but may also organize under sections 16 and 17 of the Wheeler-Howard Act if the Secretary of the Interior sees fit to establish for these eligible Indians a reservation. Such a reservation might be established either through the outright purchase of land by the Secretary of the Interior under Section 5 of the Wheeler-Howard Act, or by the relinquishment to the United States of land purchased by the Indians themselves, under the same section of the Wheeler-Howard Act, or by a combination of these two methods of acquisition. A reservation having been established, those residing thereon will be entitled to adopt a constitution and bylaws and to receive a charter of incorporation. Under section 19 of the Wheeler-Howard Act the "Indians residing on one reservation" may be recognized as a "tribe" for the purposes of the Wheeler-Howard Act regardless of their previous status. [Memorandum Opinion, dated April 8, 1935, of the Assistant Solicitor, U.S. Department of the Interior].

(1934). In House debate on the bill on June 15, 1934, the bill's principal sponsor, Congressman Howard, stated:

> The sections mentioned are designed to prevent loss of Indian land. But prevention is not enough. The Indians now landless must be provided for. This section undertakes to do this gradually through an annual appropriation for the purchase of land . . . . Incorporation [under section 16] does not answer the whole problem of Indian home rule. Section 17 grants to Indians still living in a reasonably compact community the right to organize for their common welfare, to adopt a constitution and bylaws and to elect a tribal business committee. [78 CONG. REC. 11726 (1934).]

Thus, in the Wheeler-Howard Act, Congress, pursuant to its plenary power in Indian affairs, expressly has authorized the Secretary of the Interior to take the steps which have established the lands held in trust for the Choctaws in Mississippi as an Indian reservation.

C. Pursuant to specific Congressional sanction the Secretary of the Interior established the Mississippi Choctaw Reservation by proclamation on December 4, 1944.

In addition to the general authorization to establish reservations for Indians contained in the Wheeler-Howard Act, Congress gave additional more specific sanction for the establishment of the Choctaw reservation in 1939 when it approved the request of the Secretary of the Interior for a declaration by statute that land previously purchased under earlier statutory authority for individual Choctaw Indians should henceforth be held in trust for the Choctaws as a group. Act of June 21, 1939, 53 Stat. 851. The Secretary clearly related the 1939 Act to the

Wheeler-Howard Act when he commented that the purpose of the 1939 Act would be facilitated ". . . if the Indians should organize under section 16 of the Indian Reorganization Act and take over the Administration of these lands." H.R. REP No. 194. 76th Cong., 1st Sess., 2 (1939).

After Congress specifically had sanctioned his plans for the Mississippi Choctaws by passing the 1939 Act, the Secretary proclaimed the Choctaw tribal lands in Mississippi as an Indian reservation in accordance with section 7 of the Wheeler-Howard Act. 25 U.S.C. §467. On January 11, 1945, the Secretary authorized an election for the approval of a constitution and bylaws for the Mississippi Band of Choctaw Indians in accordance with section 16 of the Act. 25 U.S.C. §476.

D. The Choctaw Indian Reservation in Mississippi is "Indian Country" as defined in the Act of June 25, 1948, 18 U.S.C. §1151.

By the Act of June 25, 1948, 62 Stat. 757, as amended, Congress defined the "Indian Country" for federal criminal jurisdictional purposes to include ". . . all land within the limits of any Indian reservation under the jurisdiction of the United States government . . ." 18 U.S.C. §1151(a). In enacting this provision in 1948 Congress merely reaffirmed by statute the principle that Indian reservations constitute Indian Country which repeatedly had been followed by this Court. *Pronovost v. United States*, 232 U.S. 487 (1914); *United States v. Kagama*, 118 U.S. 375 (1886).

This Court also has held that the determining factor in whether Indian lands constitute Indian country is not the manner in which such lands were acquired but whether or not they have been set apart for the use and occupancy

of Indians. *United States v. McGowan*, 302 U.S. 535 (1938). This principle has been followed in recent years by the federal courts in concluding that lands constitute "Indian Country" without regard to whether they formed part of a tribe's original lands or subsequently were set apart for Indians. *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971); *Youngbear v. Brewer*, 415 F.Supp. 807 (N.D. Ia. 1976) aff'd. 549 F.2d 74 (8th Cir. 1977).

Consequently, since the Choctaw lands in Mississippi have been set apart and proclaimed as a "reservation" for the Mississippi Band of Choctaw Indians, they are "Indian country". Within "Indian Country" a crime enumerated in 18 U.S.C. §1153, which includes assault with intent to commit murder, is subject to exclusive Federal jurisdiction and is not subject to prosecution under state law. *Seymour v. Superintendent*, 368 U.S. 351 (1962).

CONCLUSION

The plenary authority of Congress in Indian affairs extends to all Indians throughout the United States and is not dependent on the existence of a reservation or on lack of citizenship. The Treaty of Dancing Rabbit Creek was not intended to terminate such plenary power over the Mississippi Choctaws nor to abolish the federal relationship with them. Even if the Treaty had terminated the guardian-ward relationship between the United States and the Mississippi Choctaws, Congress has the power to reestablish the relationship. Moreover, Congress may reestablish Indian reservations and Indian tribes, as it did with respect to the Choctaw Reservation in Mississippi and the Mississippi Band of Choctaw Indians.

Therefore, the Mississippi Band of Choctaw Indians is a federally recognized Indian tribe which resides on a federal Indian reservation. Its reservation is "Indian Country" pursuant to the provisions of 18 U.S.C. §1151 (a). Consequently, its members are subject to the Federal laws which apply to Indians in the "Indian Country" as to all matters arising on its reservation. Among these laws is 18 U.S.C. §1153, which vests in the United States (to the exclusion of the State of Mississippi) jurisdiction to prosecute such members for the offenses enumerated therein.

For the foregoing reasons *Amicus Curiae* respectfully requests that the judgment of the United States Court of Appeals be reversed.

Respectfully submitted,

ARTHUR LAZARUS, JR.
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
Attorney for Amicus Curiae

Of Counsel:
S. BOBO DEAN
LEROY W. WILDER